KANSAS

SENTENCING GUIDELINES

DESK REFERENCE MANUAL

2013

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TABLE OF CONTENTS

2013 DESK REFERENCE MANUAL

INTRODUCTION

The Kansas Sentencing Guidelines Desk Reference Manual (DRM) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2013 Supp. 21-6801 *et seq.* The DRM contains features that we hope will not only inform users of the latest developments in 2013 sentencing law but also help to facilitate more efficient understanding and application of the law.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our staff for further information and assistance regarding related questions concerning the Desk Reference Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our staff at (785) 296-0923, or by e-mail at sentencing@sentencing.ks.gov.

In July of 2011 the Kansas Criminal Code was moved from K.S.A. 21-3101 *et seq.* to K.S.A. 21-5101 *et seq*. Statutory citations within the DRM cite to the new, recodified statute numbers. The Kansas Sentencing Commission's website also offers a cross-reference document between the new and former statute numbers.

The statutory listings of felonies and misdemeanors in Appendix D have also been modified to reflect the specific statutory violations based upon the 2013 Legislative Changes. In a departure from previous versions of the manual, the felony and misdemeanor appendices have been combined and organized according to statute number. As a reference, there is a new alphabetical index of crimes to help users locate the correct statute number. The complete versions of both the felony and misdemeanor statute files are posted under the "Agency Publications" link of the website.

In order to reduce the size of the Manual, the Time Line of KSGA Selected Events is posted, along with other Appendices, on the Kansas Sentencing Commission (KSC) website at www.sentencing.ks.gov. All of the 2013 legislative changes relative to the sentencing guidelines remain in the Manual and are summarized in the first section. Posting these documents on our website rather than publishing them in the Manual allows us to easily update the material as new information becomes available.

ADDITIONAL COPIES

Requests for copies of the Manual may be obtained from the Kansas Sentencing Commission at a cost of $25 each for a bound hard copy document and fifteen dollars each for a computer disk. This Manual may also be accessed and printed free of charge via the Kansas Sentencing Commission website at www.sentencing.ks.gov.

 The Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which controls and related case law.

TIME LINE OF KSGA SELECTED EVENTS

In the 2013 Legislative Session, the Legislature modified the code and also enacted several other significant statutory changes affecting the general practice of criminal law and those specifically affecting sentencing law and procedure. We highlight the following:

1) HB 2170 makes comprehensive changes to probation and postrelease supervision procedure

House Bill 2170 addresses numerous aspects regarding probation, including:

A) Graduated Sanctions – Criminal justice research has shown that providing a tier of increasingly severe penalties for successive probation violations is more effective in penalizing violations while reducing the number of probation revocations. Offenders who commit technical violations will be subjected to 'quick dip' sanctions, which consist of 2-3 days in local jail, upon their first violation. Upon a second violation, the offender can be subject to either the quick dip sanction, or a sanction of up to 120 or 180 days in prison. Upon a third violation, the offender may be subject to one of the aforementioned sanctions or the full revocation of their probation, requiring them to serve their full underlying prison sentence. Violators who abscond from probation or commit a new crime while on probation may be fully revoked at any time. In addition, the court may revoke the probation of a violator whose well-being will not be served by a graduated sanction or who poses a public safety risk.

B) Supervising Officer Quick Dip Authority – Research shows that providing swift and certain sanctions against probationers who commit technical violations is more effective in curbing undesirable probationer behavior than allowing technical violations to build up over time, potentially ultimately resulting in probation revocation a later date. House Bill 2170 provides a new tool to ensure that violations are dealt with quickly and appropriately soon after they occur. The court services officer or community corrections officer in charge of probation supervision is granted the ability, with approval of their supervisor, to authorize a 2-3 day quick dip in local jail when an offender commits a technical violation and waives their right to a violation hearing before the court. At sentencing, the court may choose to withhold the supervising officer's authority to authorize the quick dip sanction.

C) Presumptive Discharge from Probation – Research has shown that low risk probationers who comply with the terms of their probation are less likely to recidivate, and therefore supervision resources may be directed towards higher risk probationers. In order to allow this, House Bill 2170 creates a presumption of discharge for all probationers who score low risk on a criminal risk-need assessment, have paid all restitution and have complied with the terms of their probation for a period of 12 months. Unless the prosecutor or court objects, the offender may be discharged from probation by the court upon meeting the aforementioned requirements. However, an offender who is released by presumptive discharge and commits another felony during the time in which they would have been on probation may be subject to imprisonment for such crime, even if it the new crime has a presumptive nonprison sentence. See Special Sentencing Rule #40.

House Bill 2170 also makes substantial changes regarding postrelease supervision:

A) Every Offender whose Probation is Revoked Must Serve Postrelease – Research shows that offenders who are released directly from prison without any continuing supervision may be more likely to recidivate. In addition, some probationers may have been incentivized to have their probation revoked in order to serve a short prison sentence and then be relieved of their ongoing supervision. In order to remedy this, House Bill 2170 requires all offenders, including SB 123 drug treatment participants, who commit their crime on or after July 1, 2013 to serve a period of postrelease

supervision if they are revoked from probation or complete their underlying prison sentence while serving a 120 or 180-day prison sanction.

B) Good Time and Program Credits are Not Added to Period of Postrelease Supervision – Prior to July 1, 2013, offenders who earned credit against the length of their prison sentence had this credit added to the length of their period of postrelease supervision. House Bill 2170 removes this additional postrelease supervision time for all offenders other than certain sex offenders.

C) The Prisoner Review Board May Grant Early Discharge – The Prisoner Review Board may, in its discretion, provide early discharge from postrelease supervision for offenders who have paid all restitution and met any other criteria required by the Board.

In addition, House Bill 2170 authorizes the Kansas Sentencing Commission to:

A) Study the impact of supervision of felony offenders and the impact on recidivism

B) Make statewide supervision placement decisions based on the criminogenic risk-need of the offender.

2) HB 2034 addresses human trafficking and amends provisions related to certain sex crimes

House Bill 2034 designates the Human Trafficking Advisory Board to study issues relating to sexual exploitation and trafficking of adults and minors in Kansas. The board shall be funded by newly-imposed fines of $2500 to $5000 for certain crimes involving sexual relations or human trafficking.

The bill creates new procedures to protect and assist victims of human trafficking or commercial sexual exploitation, including placing the child in protective custody and delivery to a staff secure facility.

HB 2034 also creates the crime of 'commercial sexual exploitation of a child', which is an off-grid offense when the offender is 18 or older and the victim is under the age of 14. In addition, the bill replaces the crime of 'prostitution' with 'selling sexual relations, replaces the crime of 'promoting prostitution' with 'promoting the sale of sexual relations', and replaces the crime of 'patronizing a prostitute' with 'buying sexual relations' and changes the penalties for these respective crimes.

3) Kansas RICO Act provides prosecutors new tools to combat criminal street gang crime

Senate Bill 16 targets criminal street gangs and other criminal organizations engaged in human trafficking or controlled substance manufacture, cultivation or distribution. It provides prosecutors with expanded subpoena power to investigate such criminal activities and the ability to petition the court for a non-disclosure order for a period of up to 90 days.

Violation of the Kansas RICO act is a severity level 2, person felony. The court may impose a fine of up to three times the gross value gained or three times the gross loss caused, whichever is greater, if the defendant gained pecuniary value or caused personal injury, property damage, or other loss. Violation of the act is also grounds for forfeiture of all instrumentalities and proceeds of the crime.

4) Statute of limitations for rape and sexually violent crimes is extended

House Bill 2252 extends the length of the statute of limitations for bringing prosecutions for aggravated criminal sodomy and rape. Prosecutions for these crimes may now be brought at any time.

The bill also provides that prosecutions for sexually violent crimes may be brought within 10 years if the victim is 18 years of age or older, or within 10 years of the victim's 18th birthday if such victim is under

18 at the time of the offense. A prosecution for a sexually violent crime may also be brought within 1 year of DNA testing conclusively identifying the suspect, whichever is later.

The bill will extend the length of the statute of limitations for all of the aforementioned crimes whose statute of limitations had not expired by the effective date of the bill, July 1, 2013.

5) Legislature enacts expansive firearms legislation

The legislature enacted several bills dealing with the possession and registration of firearms:

- House Bill 2052, which amended the Personal and Family Protection Act and, most notably, expanded concealed carry in certain buildings and government facilities.
- House Bill 2278 carves out a specific penalty for theft, criminal deprivation of property, and burglary, when the item in question is a firearm.
- Senate Bill 21 makes changes concerning concealed carry licenses and firearm possession by convicted felons who have had their felony conviction expunged.
- Senate Bill 102, also known as the Second Amendment Protection Act, excludes firearms, ammunition and accessories made and owned in Kansas from federal regulation. It also makes it a crime to enforce federal regulations on such firearms, accessories and ammunition, and provides the Attorney General authority to seek injunctive relief to enjoin federal officials from doing so.

6) Special Session September, 2013 - Legislature amends provisions for imposition of certain mandatory minimum sentences

2013 House Bill 2002, which was passed by the legislature during a special session in September 2013, addresses the United States Supreme Court decision in *Alleyne v. U.S.*, which held that factors which increase a mandatory minimum sentence must be found, beyond a reasonable doubt, by a jury. Prior to the passage of 2013 House Bill 2002, the Kansas procedure allowed the court, not they jury, to make such findings. HB 2002 provides offenders, who were convicted of premeditated first degree murder and sentenced to a mandatory minimum sentence of 40 or 50 years by the court prior to the passage of 2013 House Bill 2002, a procedure to appeal such sentence, and the jury, not the court, shall be the finder of fact on the issue of the increased mandatory minimum.

2013 LEGISLATIVE CHANGES TO THE KSGA AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act, K.S.A. 2013 Supp. 21-6801 *et seq.*, and other related criminal statutes were made by the Kansas Legislature during the 2013 Legislative Session. These changes are summarized below under the headings of the bills in which the changes were included.

SB 16 - Kansas Racketeer Influenced and Corrupt Organization Act; Criminal Street Gangs

SB 16 creates the Kansas Racketeer Influenced and Corrupt Organization Act (Kansas RICO Act). The bill also amends the criminal street gangs definitions statute.

The Kansas RICO Act makes it a crime for any covered person:

- Who has, with criminal intent, received any proceeds from a pattern of racketeering activity or through the collection of an unlawful debt, to use or invest such proceeds in acquiring any title, right, interest, or equity in real property, or in the establishment or operation of any enterprise;

- Through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain any interest in or control of any enterprise or real property; or

- Who is employed by, or associated with, any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

"Covered person" is defined as any person who is a criminal street gang member or associate, has engaged or is engaged in human trafficking or aggravated human trafficking, or has engaged in or is engaged in the unlawful manufacturing, cultivation, or distribution of controlled substances.

The bill amends the criminal street gangs definitions statute by adjusting the criteria required to identify a person as a "criminal street gang member." To meet the definition, a person must meet three or more criteria from a list set forth in the statute. The bill separates what had been three separate parts of a single criteria into three separate criteria: that the person frequents a particular criminal street gang's area; adopts such gang's style of dress, color, use of hand signs or tattoos; or associates with known criminal street gang members.

The crime created by this act or conspiracy to commit this crime is a severity level 2, person felony. The court also may impose a fine of up to three times the gross value gained or three times the gross loss caused, whichever is greater, if the defendant gained pecuniary value or caused personal injury, property damage, or other loss. Bail for persons charged with this crime is a minimum of $50,000, unless certain conditions are met. Own recognizance (O.R.) bonds are not permitted.

The Act grants the district court the power to enjoin violations of the Act by divesting a defendant of any interest in any enterprise; imposing reasonable restrictions on activities or investments of the defendant; dissolving or reorganizing any enterprise; suspending or revoking a license, permit, or prior approval granted by a state agency; or ordering the forfeiture of a corporate charter or certificate, upon certain findings. All property used in the course of, intended for use in the course of, derived from, or realized through conduct violating the Act is subject to civil forfeiture.

Prosecuting attorneys are authorized to administer oaths or affirmations, subpoena witnesses or material, and collect evidence relating to activity violating the Act. They also are allowed to apply ex parte to a district court for an order requiring a subpoenaed person or entity to not disclose the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days. Such order may be granted only if the prosecutor shows factual grounds reasonably indicating a violation of the Act, that the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence, and facts showing that disclosure of the subpoena would hamper or impede the investigation or cause a flight from prosecution. If a person or enterprise fails to obey a subpoena, the prosecuting attorney may apply to the district court for an order compelling compliance, and a person failing to obey any court order under the Act is subject to being adjudged in contempt of court and punishment by fine and imprisonment.

SB 20 - Kansas Offender Registration Act

SB 20 amends the Kansas Offender Registration Act to:

- Change the effective dates for registration requirements to reflect when various types of offenses originally were codified;

- Correct an inaccurate statutory reference to the crime of aggravated incest;

- Specify that persons convicted of involuntary manslaughter while driving under the influence are not required to register as this crime inadvertently was included when recodification of the criminal code placed the crime within the involuntary manslaughter section;

- Clarify registration requirements for offenders in the custody of a correctional facility and prior to the offender being discharged, paroled, furloughed, or released on work or school release;

- Strike language concerning "the duration of registration" that is unnecessary and has caused confusion as to how long an offender must register;

- Provide that registration is complete even when the offender does not remit the registration fee, and failure to remit full payment within 15 days of registration is a class A misdemeanor or, if within 15 days of the most recent registration 2 or more full payments have not been remitted, a severity level 9, person felony; and

- Amend requirements for providing DNA samples to the Kansas Bureau of Investigation to align the requirements with current KBI practices.

SB 21 - Concealed Carrying and Licensing Requirements, Firearm Law Compliance for Certain Individuals

SB 21 enacts the following changes to firearms-related statutes:

- Clarifies that the expungement of a prior felony conviction does not relieve the individual of complying with any state or federal law relating to the use, shipment, transportation, receipt, or possession of firearms by a person previously convicted of a felony;

- Authorizes official recognition of any valid concealed carry permit from another state for individuals traveling through or visiting Kansas;

- Requires issuance of a 180-day receipt from the Attorney General for a new Kansas resident who possesses a permit from another state and who is required to obtain a Kansas license. This receipt is required to be carried along with the license from the original jurisdiction. The license from the original jurisdiction has to meet or exceed the Kansas requirements for concealed carry. Prior to the expiration of the 180-day receipt, the applicant needs to provide proof of training to the Attorney General's Office. Following a successful background check and receipt of documentation and fees, the application is approved for a Kansas concealed permit; and

- Makes other technical changes to existing law.

SB 58 - Methamphetamine Manufacturing—Special Sentencing Rule

SB 58 restructures: (a) the penalties for unlawful manufacturing of a controlled substance, under KSA 2012 Supp. 21-5703, and (b) a special sentencing rule for a second or subsequent conviction of the same crime, under KSA 2012 Supp. 21-6805(e), to clarify the application of the penalties and the rule depending on whether methamphetamine was the controlled substance at issue in the current conviction, the prior conviction, both, or neither.

If both the current and prior convictions do not involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule does not apply. If the prior conviction involved methamphetamine but the current conviction does not, the crime is a drug severity level 2 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment. If the prior conviction did not involve methamphetamine but the current conviction does, the crime is a drug severity level 1 felony and the special sentencing rule does not apply. If both the current and prior convictions involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

SB 102 - Second Amendment Protection Act

SB 102 establishes the Second Amendment Protection Act.

First, the bill excludes from federal regulation any personal firearm, firearm accessory, or ammunition manufactured commercially or privately and owned in Kansas. The bill provides that for as long as any such personal firearm, firearm accessory, or ammunition remains within the borders of Kansas, it is not subject to any federal law, regulation, or authority.

Second, the bill prevents any federal agent or contracted employee, any state employee, or any local authority from enforcing any federal regulation or law governing any personal firearm, firearm accessory, or ammunition manufactured commercially or privately and owned in Kansas, provided it remains within the borders of Kansas. In the process of a criminal prosecution, the bill precludes any arrest or detention prior to a trial for a violation of the Act.

Finally, the bill allows a county or district attorney or the Attorney General to seek injunctive relief in court to enjoin certain federal officials from enforcing federal law regarding a firearm, a firearm

accessory, or ammunition that is manufactured commercially or privately and owned in the state of Kansas and that remains within the borders of Kansas.

Substitute for HB 2017 - Crimes and Criminal Procedure – Appeals of Municipal Court and District Magistrate Judgments; Reporting of Pornographic Materials Seized or Documented as Evidence

Sub. for HB 2017 amends provisions of the Kansas Code of Criminal Procedure concerning appeals of municipal court and district magistrate judgments, search warrants, and reporting of pornographic materials seized or documented as evidence.

Municipal Court and District Magistrate Judgments

The bill amends the law concerning appeals to the district court of municipal court judgments and judgments of a district magistrate judge to provide that these appeals can be filed only after the sentence has been imposed. Further, the bill provides no appeal can be taken more than 14 days after the sentence is imposed.

Reporting of Pornographic Materials Seized or Documented as Evidence

The bill creates a new section of law requiring the Kansas Bureau of Investigation (KBI) to work with the Attorney General and state and local law enforcement to develop a data reporting process enabling at least an annual report of the number of sexually violent crimes reported and the number of such crimes where pornographic materials are seized or documented as evidence. The report is used solely for statistical purposes. The bill requires this process to be in place within one year of the implementation of a capable central repository. Upon the implementation of a capable central repository, the KBI must make the necessary changes to the Kansas Standard Offense Report and the Kansas Incident Based Reporting System (KIBRS) Handbook and promulgate rules and regulations concerning training of law enforcement to implement these provisions. The bill provides that it cannot be construed to expand the scope of an officer's search. The bill also defines "nudity," "pornographic materials," "sexually explicit conduct," and "sexually violent crime."

HB 2028 - Venue in Civil Forfeiture Proceedings

HB 2028 amends provisions of the Kansas Standard Asset Seizure and Forfeiture Act concerning venue in forfeiture proceedings brought by the Attorney General. Previously, a proceeding could be commenced and maintained in the county where the property is located or where a civil or criminal action could be commenced and maintained against an owner or interest holder for the alleged conduct giving rise to the forfeiture. The bill adds a provision allowing a proceeding brought by the Attorney General to commence and be maintained in Shawnee County. If, however, a motion to change venue is properly filed within 20 days after service of the petition commencing such proceeding, the court must transfer the proceeding to another county where there is proper venue. The bill also provides that if the proceeding brought by the Attorney General involves property, law enforcement agencies, or owners or interest holders of property in multiple counties, venue is proper in Shawnee County or any county where there is proper venue, as described above.

HB 2033 - Uniform State Law for Knives

HB 2033 prohibits municipalities from regulating the transportation, possession, carrying, sales, transfers, purchases, gifting, licensing, registration, or uses of a knife or knife-making components. In addition, the bill prohibits a municipality from passing any ordinance, resolution, or rule that would be more restrictive regarding knife manufacturing than the manufacture of any other commercial product.

The bill amends provisions related to the criminal use of weapons and criminal carrying of a weapon by removing certain types of knives, as well as by eliminating certain exceptions for carrying specific types of pocket knives and switchblade knives.

The bill also excludes from the definition of "municipality," school districts, jails, and juvenile correctional facilities.

Senate Substitute for HB 2034 - Human Trafficking—Advisory Board; Victim Assistance Fund; Related Crimes; Staff Secure Facilities; Civil Forfeiture

Senate Sub. for HB 2034 creates or amends several statutes related to the issue of human trafficking. First, the bill authorizes the Attorney General, in conjunction with other appropriate state agencies, to coordinate training regarding human trafficking for law enforcement agencies throughout the state and would designate the Attorney General's Human Trafficking Advisory Board as the official human trafficking advisory board of Kansas. The bill also establishes the Human Trafficking Victim Assistance Fund, which will be funded by the collection of fines imposed as described in the following paragraphs. The funds will be used to pay for training provided and support care, treatment, and other services for victims of human trafficking and commercial sexual exploitation of a child.

The crime of "commercial sexual exploitation of a child" is created and defined as knowingly:

- Giving, receiving, offering or agreeing to give, or offering or agreeing to receive, anything of value to perform any of the following acts:
    - Procuring, recruiting, inducing, soliciting, hiring, or otherwise obtaining any person younger than 18 years of age to engage in sexual intercourse, sodomy, or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another; or
    - Procuring, recruiting, inducing, soliciting, hiring, or otherwise obtaining any person where there is an exchange of value, for any person younger than 18 years of age to engage in sexual intercourse, sodomy, or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the patron, the offender, or another;

- Establishing, owning, maintaining, or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance, or management thereof;

- Permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant, to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age; or

- Procuring transportation for, paying for the transportation of, or transporting any person younger than 18 years of age within this state with the intent of causing, assisting, or promoting that person's engaging in selling sexual relations.

Commercial sexual exploitation of a child is a severity level 5, person felony and carries a fine of not less than $2,500 nor more than $5,000, unless the person, prior to the commission of the crime, has been convicted of a violation of this section, in which case it is a severity level 2, person felony and carries a fine of not less than $5,000.

Further, the crime or attempt, conspiracy, or criminal solicitation to commit the crime is an off-grid person felony when the offender is 18 years of age of older and the victim is less than 14 years of age. A fine of not less than $5,000 also will be imposed.

Additionally, the court may order any person convicted of this crime to enter into and complete a suitable educational and treatment program regarding commercial sexual exploitation of a child.

Throughout, the bill changes "prostitution" to "selling sexual relations," "house of prostitution" to "place where sexual relations are being sold or offered for sale by a person who is 18 years of age or older," and "prostitute" to "person selling sexual relations who is 18 years of age or older."

The bill provides it is an affirmative defense to the crime of "selling sexual relations" that the defendant committed the crime because the defendant was subjected to human trafficking, aggravated human trafficking, or commercial exploitation of a child. Additionally, the bill allows persons convicted of prostitution or selling sexual relations who entered into a diversion agreement and who can prove they were acting under coercion caused by the act of another to petition the convicting court for the expungement of the conviction or diversion agreement and related arrest records after one or more years have elapsed since the person satisfied the sentence imposed or the terms of a diversion agreement or was discharged from probation, a community correctional services program, parole, post-release supervision, conditional release, or a suspended sentence.

The bill requires a notice offering help to victims of human trafficking to be posted on the official websites of the Attorney General, Department for Children and Families (DCF), and the Department of Labor, providing information to help and support victims of human trafficking, including information about the National Human Trafficking Resource Center Hotline. The Secretary of Labor is required to consult with the Attorney General and create an education plan to raise awareness among Kansas employers about human trafficking, the hotline, and other resources. The Secretary is required to report progress to the House and Senate Judiciary Committees on or before February 1, 2014.

"Promoting prostitution" becomes "promoting the sale of sexual relations," which is a severity level 9, person felony, rather than a class A person misdemeanor, and requires a fine of not less than $2,500 nor more than $5,000. An exception will exist if the person, prior to the commission of the crime, has been convicted of a violation of KSA 2012 Supp. 21-6420 (promoting the sale of sexual relations), in which case it is a severity level 7 person felony and carries a fine of not less than $5,000.

The bill also renames the crime of "patronizing a prostitute" to "buying sexual relations" and expands the definition to include hiring a person selling sexual relations who is 18 years of age or older or entering a place where sexual relations are being sold or offered for sale with intent to engage in manual or other

bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another.

The crime becomes a class A person misdemeanor, rather than a class C misdemeanor, and carries a fine of $2,500, except if the person, prior to the commission of the crime, has been convicted of a violation of this section, in which case it is a severity level 9 person felony and carries a fine of not less than $5,000. Additionally, the court may order any person convicted to enter into and complete a suitable educational and treatment program regarding commercial sexual exploitation of a child.

Aggravated human trafficking committed in whole or in part for the sexual gratification of the defendant or another and commercial sexual exploitation of a child are classified as "sexually violent crimes" for the purposes of sentencing, postrelease supervision, and offender registration. A person convicted of commercial sexual exploitation of a child is required to register for life.

The bill adds commercial sexual exploitation of a child, if the victim is less than 14 years of age, to the list of crimes in the statute imposing a minimum 25-year sentence. Similarly, the bill adds aggravated human trafficking committed if the victim is less than 14 years of age and commercial sexual exploitation of a child, if the victim is less than 14 years of age, as a crime listed as a "crime of extreme sexual violence," which is an aggravating factor considered in determining whether substantial and compelling reasons exist to impose a departure sentence.

Further, human trafficking, aggravated human trafficking, sexual exploitation of a child, commercial sexual exploitation of a child, and buying or selling sexual relations are added to the list of suspected crimes that justify a wiretap.

Statutes related to municipal courts are amended to impose the fines provided for the offenses described above and to direct the fines collected to the Human Trafficking Victim Assistance Fund.

The bill also creates a new section in and makes amendments to the Revised Code for the Care of Children, which will take effect January 1, 2014. Specifically, when any child is in custody who has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or who has committed an act which, if committed by an adult, would constitute the crime of selling sexual relations, the court is required to refer the child to the Secretary of DCF. The Secretary is required to use a research-based assessment tool to assess the safety, placement, and treatment needs of the child, and make appropriate recommendations to the court.

The bill allows a law enforcement officer to take a child into custody if the officer reasonably believes the child is a victim of human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child. The officer is required to place the child in protective custody and is allowed to deliver the child to a staff secure facility. The officer is required to contact DCF to begin an assessment of the child via a rapid response team to determine appropriate and timely placement.

The requirements for a "staff secure facility" are added to statutes and include: no construction features designed to physically restrict the movements and activities of residents; written policies and procedures that include the use of supervision, inspection, and accountability to promote safe and orderly operations; locked entrances and delayed-exit mechanisms to secure the facility; 24-hour-a-day staff observation of all entrances and exits by a retired or off-duty law enforcement officer; screening and searching of residents and visitors; policies and procedures for knowing resident whereabouts, handling runaways and unauthorized absences; and restricting or controlling resident movement or activity for treatment

purposes. Such a facility will provide case management, life skills training, health care, mental health counseling, substance abuse screening and treatment, and other appropriate services to children placed there. Service providers in the facility will be trained to counsel and assist victims of human trafficking and sexual exploitation.

The bill also allows the court to issue an ex parte order placing a child in a staff secure facility when the court determines the necessity for an order of temporary custody and there is probable cause to believe the child has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or if the child committed an act, which, if committed by an adult, would constitute selling sexual relations. If the court places the child with DCF, the agency has the discretionary authority to place the child in a staff secure facility if the above circumstances exist.

The bill allows the court to enter an order of temporary custody following a hearing if the court determines there is probable cause to believe the child has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or if the child committed an act, which, if committed by an adult, would constitute selling sexual relations. Under such circumstances, the court is authorized to place the child in a staff secure facility. Similarly, if the court places the child with DCF, the agency has the discretionary authority to place the child in a staff secure facility if the above circumstances exist.

If a child has been removed from the custody of a parent, the court may award custody to a staff secure facility if the circumstances described above exist.

Further, the bill amends the Revised Kansas Juvenile Justice Code to allow for expungement of a juvenile's records and files if the court finds one year has elapsed since the final discharge for an adjudication concerning acts committed by a juvenile, which, if committed by an adult, would constitute selling sexual relations.

Finally, the bill adds commercial sexual exploitation of a child to the list of offenses giving rise to civil forfeiture.

HB 2041 - Municipal Court Reporting of Criminal History Record Information

HB 2041 amends provisions concerning a municipal judge's duty to ensure certain conviction information for city ordinance violations is forwarded to the Kansas Bureau of Investigation (KBI) central repository. The bill expands the duty to include all violations comparable to convictions for statutory criminal offenses, not only convictions for class A and B misdemeanors. The bill also requires reporting of filing and disposition of cases alleging operation of a vessel while under the influence of alcohol or drugs (boating under the influence) to the central repository. Reporting of filing and disposition of cases involving driving under the influence (DUI) and commercial DUI already was required and, along with reports concerning boating under the influence, the bill extends from July 1, 2013, to July 1, 2014, the date by which those reports must be made electronically.

Further, the bill requires the KBI Director to adopt rules and regulations by July 1, 2013, requiring district courts to report the filing and disposition of all cases alleging DUI or refusal to submit to a test to determine the presence of alcohol or drugs (criminal refusal). The former requirement was adoption of rules and regulations by July 1, 2012, concerning just the filing of cases alleging DUI. Similarly, the bill requires the Director to adopt rules and regulations by July 1, 2014, requiring district courts to

electronically report all case filings and dispositions for DUI or criminal refusal. The former requirement was adoption of rules and regulations by July 1, 2013, concerning just the filing of cases alleging DUI.

Finally, the bill amends the definition of "criminal history record information" to exclude information regarding the release of defendants from confinement by the Department of Corrections or a jail, which is intended to clarify that the Department or a jail may provide notice of release.

Senate Substitute for HB 2043 - Attorney General—Duties; Notice of Intent to Seek the Death Penalty

Senate Sub. for HB 2043 amends the statute setting forth the duties of the Attorney General to clarify that the Attorney General will represent the State in "any and all" actions in the Kansas Supreme Court, Kansas Court of Appeals, and in all federal courts in which the state is interested or a party. The bill clarifies that the Attorney General, when so appearing, controls the State's prosecution or defense.

The bill also amends the law concerning notice required in capital murder cases that a county or district attorney intends to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. The bill allows the Attorney General to file notice in cases where the county or district attorney or a court determines a conflict exists. The bill also changes "county or district attorney" to "prosecuting attorney" to reflect the Attorney General's ability to file notice.

HB 2044 - Distribution of a Controlled Substance Causing Great Bodily Harm or Death

HB 2044 creates two new crimes. The first crime, distribution of a controlled substance causing great bodily harm, a severity level 5, person felony, is defined as unlawfully distributing a controlled substance when great bodily harm results from the use of such controlled substance. The second crime, distribution of a controlled substance causing death, a severity level 1, person felony, is defined as unlawfully distributing a controlled substance when death results from the use of such controlled substance. The fact that a user contributed to the user's own great bodily harm or death by using the controlled substance or consenting to its administration by another is not a defense to either crime. The bill also defines key terms.

Senate Substitute For HB 2052 - Concealed Carry of Handguns and Other Firearms Amendments

Senate Sub. For HB 2052 enacts new law and amends existing law concerning firearms, criminal law, and the Personal and Family Protection Act (concealed carry of handguns).

Specifically, the bill:

- Prohibits the unlawful discharge of a firearm within or into the corporate limits of any city. The bill provides exemptions for when a firearm may be discharged within or into a city and also classifies the unlawful discharge of a firearm as a class B, nonperson misdemeanor;

- Modifies the Personal and Family Protection Act to allow the possession of firearms on certain governmental property, including in state and municipal buildings;

- Defines, for the purposes of the bill, the terms "adequate security measures," "municipality," "restricted access entrance," "state and municipal building," and "weapon";

- Excludes school districts from the definition of "municipality";

- Excludes the State Capitol from the definition of "state and municipal building";

- Requires adequate security measures at public entrances of state and municipal buildings in order to prohibit the carrying of any weapon into a building;

- Prevents a state agency or municipality from prohibiting a licensed employee from carrying a concealed handgun at the employee's workplace, unless the building has adequate security measures and adopted personnel policies prohibit such concealed carry by employees who are licensed;

- Provides that it will not be a violation of the provisions in the bill for a licensed person to carry a concealed handgun through a restricted access entrance into a state or municipal building with adequate security measures;

- Establishes that it is not be a crime for a person to carry a concealed handgun into a public building if properly posted and allows for the denial to a building or removal of such person from a building where concealed carry is prohibited;

- Provides liability protections for entities allowing concealed carry in state or municipal buildings;

- Allows corrections facilities, jail facilities, or law enforcement agencies to prohibit the carrying of handguns or firearms, concealed or unconcealed, into the secured areas of such buildings, except any other area of such building, outside a secured area and readily accessible to the public, shall be subject to provisions in the bill;

- Permits the chief judge of each judicial district to prohibit the carrying of a concealed handgun into courtrooms or ancillary courtrooms within the district provided other means of security are employed;

- Allows the governing body or chief administrative officer of any state or municipal building to exempt the building for four years, subject to developing a plan for security measures and filing notification of the exemption;

- Provides a specific four-year exemption for any state or municipal building if the governing body or chief administrative officer follows specified procedures for exempting certain entities identified in the bill: public medical care facilities, public adult care homes, community mental health centers, indigent health care clinics, and post-secondary educational institutions;

- Permits school districts, post-secondary educational institutions, public medical care facilities, public adult care homes, community mental health centers, and indigent health care clinics to allow a licensed employee to concealed carry a handgun if the employee meets the entity's general policy requirements and if the entity does not have a personnel policy prohibiting employees from concealed carry of a handgun;

- Excludes the buildings of the Kansas School for the Blind and School for the Deaf from application for a designated institutional exemption;

- Removes a specific listing of buildings in current law where concealed carrying is prohibited and inserts the new phrase "any building";

- Strikes language prohibiting the possession of a firearm on the grounds of certain government buildings, including the State Capitol, and retains existing law prohibiting "open carry" in state and municipal buildings;

- Exempts the State Capitol from provisions of the bill on and after July 1, 2014, and allows a licensee to carry a concealed handgun in the State Capitol, unless the Legislative Coordinating Council determines the Statehouse does have adequate security measures;

- Updates a statute by striking an outdated reference to the Ombudsman of Corrections which no longer exists;

- Unless otherwise required by law, prohibits the release of records that would disclose the name, home address, zip code, e-mail address, phone number or cell number, or other contact information of any person licensed to carry concealed handguns. The provision also applies to applicants for a license;

- Deletes a reduced fee for a concealed carry license obtained by retired law enforcement officers;

- Allows corrections officers, parole officers, and corrections officers employed by the Federal Bureau of Prisons to apply professional firearms certification toward training requirements for a concealed carry license;

- Adds law enforcement officers from other states and qualified retired law enforcement officers to a list of individuals exempted from the law prohibiting the criminal carrying of a weapon;

- Allows law enforcement officers from other states and qualified retired law enforcement officers to possess handguns within buildings where concealed carry may be prohibited;

- Provides liability protections regarding concealed carry for private businesses either allowing or prohibiting concealed carry in private buildings;

- Changes all references in the bill for either premise or premises and facility or facilities to either building or buildings; and

- Makes most provisions in the bill effective on July 1, 2013, and the provisions pertaining to the State Capitol effective on July 1, 2014 (unless the Legislative Coordinating Council determines the Statehouse does not have adequate security measures as defined in the bill).

HB 2093 - Crimes and Criminal Procedure; DNA Testing, Felony Murder, Computer Crimes, Identity Theft and Identity Fraud

HB 2093 amends the law concerning crimes and criminal procedure, on topics including DNA testing, felony murder, computer crimes, and identity theft and identity fraud.

DNA Testing
The bill amends the statute allowing a person convicted of first-degree murder or rape to petition the court for forensic DNA testing of certain biological material. Specifically, in the provision addressing the duties of the court when the results of such testing "are favorable to the petitioner," the bill adds that the results "are of such materiality that a reasonable probability exists the new evidence would result in a different outcome at trial or sentencing."

Felony Murder
The bill amends the law concerning felony murder to specify:

- Felony murder is an alternative method of proving first degree murder;
- Provisions allowing for prosecution of more than one crime and governing lesser included crimes do not apply to felony murder;
- Felony murder is not a separate crime or a lesser included offense of first degree murder or capital murder; and
- Felony murder has no lesser included offenses.

The bill also would state these amendments establish a procedural rule for the conduct of criminal prosecutions and would be construed and applied retroactively to all cases currently pending.

Computer Crimes, Identity Theft, and Identity Fraud
The bill amends statutes concerning computer crimes and the definitions of the crimes of identity theft and identity fraud. The bill makes it unlawful for any person to knowingly and without authorization to disclose a number, code, password, or other means of access to a social networking website or personal electronic content. It also is unlawful for any person to knowingly and without authorization access or attempt to access any social networking website. Commission of these acts is a class A nonperson misdemeanor. Further, the bill increases the severity level from a level 8, nonperson felony to a level 5, nonperson felony for certain computer crimes where the monetary loss to the victim is more than $100,000.

The bill amends the definition of the crime of identity theft to include obtaining, possessing, transferring, using, selling, or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person with intent to misrepresent that person in order to subject that person to economic or bodily harm. Commission of such acts is a severity level 8, nonperson felony, except where monetary loss to the victim is more than $100,000, in which case it will be a severity level 5, nonperson felony.

Additionally, the bill amends the definition of "personal identifying information," which appears in the definitions of identity theft and identity fraud, to include passwords, usernames, or other log-in information that can be used to access a person's personal electronic content, including, but not limited to, content stored on a social networking website. The bill includes definitions for "personal electronic content" and "social networking website."

HB 2164 - Information Regarding Citizenship of Prospective Jurors; Grand Juries

HB 2164 amends the law concerning juries. First, the bill requires a jury commissioner to submit to the Secretary of State information regarding citizenship received from a prospective juror or court that disqualifies or potentially disqualifies the prospective juror from service. The information is limited to

the full name, current and prior addresses, age, telephone number, and, if available, the date of birth of the prospective juror. The bill requires the jury commissioner to submit the information in a form and manner approved by the Secretary of State and specifies the information will be used for maintaining voter registrations.

Additionally, the bill amends grand jury statutes to:

- Allow the district attorney or county attorney in such attorney's county to petition the chief judge or designee to summon a grand jury to consider any alleged felony violation;
- In any judicial district, allow the Attorney General to petition the chief judge or the chief judge's designee in such judicial district to consider any alleged felony violation if authorized by the district or county attorney in such judicial district, or if jurisdiction is otherwise authorized by law;
- Add a requirement that the district court, if it finds the petition is in proper form and orders a grand jury to be summoned, issue such order within 15 days after receipt of the petition;
- Clarify that grand jury members must be "qualified" in the same manner as petit jurors;
- Clarify that grand juries impaneled by petition of a county attorney, district attorney, or the Attorney General may not employ special counsel;
- Specify the following duties of the prosecuting attorney to grand juries impaneled by such attorney's petition:
    - Attend all sessions and inform the grand jury of all offenses liable to indictment and evidence to be presented;
    - Present and examine witnesses on all matters to be considered; and
    - Provide members of the grand jury with advice related to all questions as to the proper discharge of their duties;
- Revise the provision governing what matters a grand jury member, attorney, interpreter, reporter, or typist may disclose, to require a court order and permit disclosure only of:
    - Witness testimony to a defendant to determine consistency, only upon a showing of good cause;
    - Evidentiary materials presented to one grand jury to a succeeding grand jury; and
    - Grand jury testimony by a defendant to the defendant, but only in the criminal action resulting from such testimony;
- Allow a grand jury impaneled by petition of a prosecuting attorney to serve for a period of six months, which can be extended before expiration for another period of up to six months, for good cause shown by the grand jury; and
- Allow the court to order the amendment of an indictment with regard to non- substantive matters that would not prejudice the defendant on the merits, and allow the court to grant the defendant a continuance to prepare a defense upon such amendment.

Additionally, the bill amends provisions concerning grand juries summoned by petition, commonly referred to as citizens grand juries. The bill requires a petition to summon a grand jury to state the name, address, and phone number of the person filing the petition, the subject matter of the prospective grand jury, a reasonably specific identification of areas for inquiry, and sufficient general allegations to warrant a finding that such inquiry may lead to information, which, if true, would warrant a true bill of indictment.

After a prosecutor has conducted an examination of the prospective grand jurors, the bill requires the court to approve and submit to the clerk of the county a list of all remaining legally qualified grand jurors for a second drawing of grand juror names. Upon receipt of the list, the clerk will draw for a second time 15 names of persons to serve as grand jurors from that list. If the county has an alternate method for securing jury panels directly from the computer, the clerk must use the computer to generate 15 names of persons to serve as grand jurors from that list.

After a citizens grand jury is summoned, but before it begins its deliberations, the bill requires the judge or judges of the district court of the county in which the petition is presented to provide instructions to the grand jury regarding its conduct and deliberations. The bill lists those instructions required to be presented, but states the instructions given are not limited to the instructions listed in the bill.

The bill also requires the person filing the petition to be the first witness called by the grand jury for the purpose of presenting evidence and testimony as to the subject matter and allegations of the petition. The bill allows the grand jury to investigate any concerns associated with the petition and to select any special counsel or investigator employed by the grand jury by majority vote after hearing testimony from the person filing the petition. The bill also allows any person to file with the prosecuting attorney or with the foreman of the grand jury a written request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The written request includes a summary of that person's written testimony.

Upon a majority vote of the grand jury, the bill allows the grand jury to seek the removal of the assigned judge pursuant to existing law that provides for removal if a party or party's attorney believe the judge to whom an action is assigned cannot afford that person a fair trial in the action.

Finally, the bill makes a variety of non-substantive, technical changes to update and restructure the statutes.

HB 2169 - Requests for Final Disposition of Pending Proceedings

HB 2169 amends the law concerning the right of imprisoned persons to request final disposition of pending proceedings to include motions to revoke probation. If the court fails to hold a hearing on the motion to revoke probation within 180 days of receipt of the request, the motion is no longer of any further force or effect and the court must dismiss the motion with prejudice. Escape from custody of any prisoner subsequent to requesting final disposition of a motion to revoke probation voids the request.

HB 2170 - Sentencing, Postrelease Supervision, and Probation

HB 2170 makes numerous changes to sentencing, postrelease supervision, and probation statutes.
The bill allows a low-risk defendant who has paid all restitution and for 12 months has been compliant with the terms of probation, assignment to community corrections, suspension of sentence, or nonprison sanction to be eligible for discharge from such period of supervision by the court. In that instance, the court is required to grant the discharge absent substantial and compelling reasons for denying discharge. A person serving a period of incarceration for a supervision violation is not eligible for modification until the person is released and returned to postrelease supervision. The Prisoner Review Board also has the discretion to provide for early discharge from postrelease supervision if the defendant has petitioned for early discharge and has paid any restitution ordered.

Further, the bill provides program credits earned and subtracted from an inmate's prison sentence are not added to the inmate's postrelease supervision term, with the exception of a term for a person sentenced to prison for a sexually violent crime, a sexually motivated crime requiring the offender to register, electronic solicitation, or unlawful sexual relations. Similarly, the bill provides that good time earned and subtracted from the prison sentence or any other consecutive or concurrent sentence of a person sentenced to prison for a sexually violent crime, a sexually motivated crime requiring the offender to register, electronic solicitation, or unlawful sexual relations is added to the inmate's postrelease supervision term.

Concerning participation in drug abuse treatment programs, the bill allows for sanctions, in addition to revocation of probation (which already was allowed), when a defendant fails to participate in or has a pattern of intentional conduct that demonstrates the defendant's refusal to comply with or participate in a drug abuse treatment program.

In the area of violations of the conditions of release, assignment, or nonprison sanction, the bill allows a defendant arrested for such a violation to waive the right to a hearing on the violation, after the defendant has been apprised of the right by the supervising court services or community correctional services officer. If the original crime of conviction was a misdemeanor and the violation is established, the bill allows the court to continue or revoke the probation, assignment to community corrections, suspension of sentence, or nonprison sanction; require the defendant to serve the sentence imposed or any lesser sentence; and, if imposition of sentence was suspended, impose any sentence that originally might have been imposed.

If the defendant waives the right to a hearing and, in the sentencing order, the court has not specifically withheld the authority of court services or community corrections to impose sanctions, the defendant's supervising court services officer, with the concurrence of the chief court services officer, or the defendant's community corrections officer, with the concurrence of the community corrections director, may impose an intermediate sanction of confinement in jail for up to six days each month in any three separate months during the period of release of supervision. The 6 days per month can be imposed only as 2-day or 3-day consecutive periods, not to exceed 18 total days of confinement.

If the original crime of conviction was a felony and the violation is established, the bill allows the court to impose the following series of increasing violation sanctions:

- Continue or modify the conditions of release;
- Impose the intermediate sanction of confinement in jail outlined above;
- If the violator already had at least one intermediate sanction of confinement in jail, remand the defendant to the custody of the Kansas Department of Corrections (KDOC) for a period of 120 days, which the Secretary could reduce by up to 60 days (this penalty could not be imposed more than once during the term of supervision);
- If the violator already had been remanded to KDOC custody for a period of 120 days, remand the defendant to KDOC custody for a period of 180 days, which the Secretary could reduce by up to 80 days (this penalty could not be imposed more than once during the term of supervision); or
- If the violator already had been remanded to KDOC custody for a period of 180 days, revoke probation, assignment to community corrections, suspension of sentence, or nonprison sanction; require the defendant to serve the sentence imposed or any lesser sentence; and, if imposition of sentence was suspended, impose any sentence that originally might have been imposed.

The bill provides, however, that the period of time spent in jail or in the custody of KDOC cannot exceed the time remaining on the person's underlying prison sentence. Upon completion of time spent in the custody of KDOC, the offender returns to community corrections supervision, and the bill specifies sheriffs are not responsible for the return of the offender to the county where the community correctional services supervision is assigned.

The court may revoke the probation, assignment to community corrections, suspension of sentence, or nonprison sanction without first imposing the preceding violation sanctions:

- If the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender otherwise will not be served; or
- If the offender commits a new felony or misdemeanor or absconds from supervision.

For crimes committed on and after July 1, 2013, an offender whose nonprison sanction is revoked or whose underlying prison term expires after being remanded to the custody of KDOC is required to serve a period of postrelease supervision upon completion of the prison portion of the underlying sentence. Persons convicted of crimes committed on or after July 1, 2003, but before July 1, 2013, are not subject to a period of postrelease supervision. For offenders sentenced prior to July 1, 2013, who are eligible for modification of their postrelease supervision obligation, KDOC is required to modify the period of postrelease supervision pursuant to the schedule outlined in the bill.

Finally, the bill gives the Kansas Sentencing Commission (KSC) the authority to make statewide supervision and placement cutoff decisions based upon the risk levels and needs of the offender. Additionally, the KSC must periodically review data and make recommended changes and must determine the impact and effectiveness of supervision and sanctions for felony offenders regarding recidivism and prison and community-based supervision populations.

HB 2217 - Female Genital Mutilation

HB 2217 creates the crime of female genital mutilation, a severity level 3, person felony, defined as:

- Knowingly circumcising, excising, or infibulating the whole or any part of the labia majora, labia minora, or clitoris of a female under 18 years of age;

- Removing a female under 18 years of age from this state for the purpose of circumcising, excising, or infibulating the whole or any part of the labia majora, labia minora, or clitoris of such female; or

- Causing or permitting another to perform such conduct when the person causing or permitting such conduct is the parent, legal guardian, or caretaker of the victim.

An exception exists if the procedure is medically necessary pursuant to the order of a physician when the procedure is performed by a physician. It is not a defense, however, that the conduct is required as a matter of custom, ritual, or religious practice or that the victim or the victim's parent, legal guardian, or caretaker consented to the procedure.

The bill defines "caretaker" and "physician."

HB 2218 - Driving Under the Influence of Alcohol or Drugs

HB 2218 amends statutes concerning the crime of driving under the influence of alcohol or drugs (DUI). First, the bill amends the law governing when a law enforcement officer must request a person submit to alcohol or drug testing. Specifically, the bill adds to language concerning an officer's reasonable grounds to believe the person was DUI to require that the officer have such a belief "at the time of the request." Further, the bill requires an officer to request alcohol or drug testing when the officer has such a belief and the person has been arrested or otherwise taken into custody for any violation of any state statute, county resolution, or city ordinance. Testing already was required if the person was arrested or taken into custody for a DUI offense.

The bill specifies that the sentence for felony violation of criminal refusal and commercial DUI is that provided for in the specific mandatory sentencing requirements of those statutes.

The bill also amends the definition of the crime of aggravated battery to include DUI:

- When great bodily harm to another person or disfigurement of another person results from such act, which is a severity level 5, person felony; and

- When bodily harm to another person results from such act under circumstances whereby great bodily harm, disfigurement, or death can result from such act, which is a severity level 8, person felony.

For the purpose of determining whether a new DUI conviction is a first, second, third, or subsequent conviction, which impacts the penalty imposed, aggravated battery while DUI is considered a prior DUI conviction. The bill also adds clarifying language concerning DUI offenses committed by persons under the age of 21 and replaces "drive" with "operate."

Finally, the bill amends the boating under the influence statutes to make them more consistent with DUI statutes. The changes include:

- Adding a provision prohibiting the operation or attempt to operate any vessel while the alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence (as defined in statute), is 0.08 or more;

- Changing the time period within which a person is prohibited from operating or attempting to operate a vessel if that person's alcohol concentration is 0.08 or more from two hours to three hours;

- Revising the prohibition on operating a vessel while under the influence of alcohol to include the phrase "to a degree that renders the person incapable of safely operating a vessel";

- Removing a provision prohibiting the operation of a vessel by a habitual user of any narcotic, hypnotic, somnifacient, or stimulating drug; and

- Revising the definition of "other competent evidence" to extend the time for sampling from two hours to three hours.

The boating under the influence provisions of the bill will be effective from and after January 1, 2014, and their publication in the statute book.

HB 2252 - Statute of Limitations for Rape and Sexually Violent Crimes

HB 2252 allows a prosecution for rape or aggravated criminal sodomy to be commenced at any time. Additionally, the bill allows for prosecution of a sexually violent crime to commence within ten years when the victim is 18 years old or older. When the victim is under 18 years, the bill allows for prosecution of a sexually violent crime to commence within one year of the date the identity of the suspect is conclusively established by DNA testing, or within ten years (increased from the former period of five years) of the date the victim turns 18 years of age, whichever is later.

HB 2278 - Crimes Involving Firearms

HB 2278 makes theft of a firearm valued at less than $25,000 a severity level 9, nonperson felony. Previously, there was no penalty specific to theft of firearms; however, theft of property valued between $1,000 and $25,000 was a severity level 9, nonperson felony, and theft of property valued below $1,000 was a class A nonperson misdemeanor. For theft of property from three separate mercantile establishments within 72 hours as part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct, a severity level 9, nonperson felony, the bill adds a maximum value of $1,000 for the property.

Additionally, pursuant to the bill, criminal deprivation of a firearm becomes a severity level 9, nonperson felony. The former law had no penalty specific to criminal deprivation of a firearm; however, criminal deprivation of property other than a motor vehicle was a class A nonperson misdemeanor, and a second or subsequent conviction carried a sentence of at least 30 days imprisonment and a fine of at least $100.

Finally, burglary with intent to commit the theft of a firearm becomes a severity level 5, nonperson felony. Formerly, burglary was either a severity level 7 or severity level 9, nonperson felony.

HB 2353 - Synthetic Cannabinoids

HB 2353 adds a synthetic cannabinoid, commonly known as UR-144, to the list of schedule I controlled substances.

SPECIAL SESSION, SEPTEMBER 2013

HB 2002 – SENTENCING OF CERTAIN PERSONS TO A MANDATORY MINIMUM

Term of Imprisonment of 50 Years;

HB 2002 amends the procedure for imposing a life sentence with a mandatory minimum term of imprisonment of 50 years (the Hard 50 sentence), rather than 25 years, when a defendant is convicted of premeditated first degree murder. The bill adds provisions setting forth the procedure to be followed for premeditated murders committed on or after the effective date of the bill. The bill also amends the existing procedure for premeditated murders committed prior to the effective date of the bill. The procedures in each situation are similar.

Procedure for Crimes Committed On or After the Effective Date

The bill adds a new subsection establishing the procedure to be followed for sentencing for premeditated murders committed on or after the effective date of the bill. In such cases, after conviction and upon

reasonable notice by the prosecuting attorney, the bill requires the court to conduct a separate proceeding as soon as practicable for the jury to determine whether one or more aggravating circumstances outlined in statute exist for the purpose of imposing the 50-year sentence.

The bill specifies any decision of the jury must be beyond a reasonable doubt regarding the existence of an aggravating circumstance. If one or more of the aggravating circumstances are found to exist beyond a reasonable doubt, the Hard 50 sentence will be imposed unless, following a review of mitigating circumstances, the sentencing judge finds substantial and compelling reasons to impose a life sentence with a minimum 25-years imprisonment before being eligible for parole, which could not be reduced by application of good-time credits. No other sentence is allowed, and the judge must state on the record at the time of sentencing the substantial and compelling reasons for imposing this 25-year sentence.

Procedure for Crimes Committed Prior to the Effective Date

The bill also modifies the existing procedure for imposing the Hard 50 sentence if a defendant is convicted of premeditated first degree murder for a crime committed prior to the effective date of the bill. A provision of the bill states these amendments establish a procedural rule for sentencing proceedings, and as such will be construed and applied retroactively to all crimes committed prior to the effective date, except for those cases in which the conviction and sentence were final prior to June 17, 2013, unless the conviction or sentence has been vacated in a collateral proceeding. Using a procedure similar to that outlined in this new provision, the bill requires the court, upon reasonable notice by the prosecuting attorney, to conduct a separate sentencing proceeding allowing a jury to determine whether to impose the 50-year sentence, unless the jury is waived.

Procedure for Cases on Appeal After the Effective Date

For all cases on appeal after the effective date of the bill, if a Hard 50 sentence imposed pursuant to the prior law is vacated for any reason other than sufficiency of the evidence as to all aggravating circumstances, the bill requires resentencing under the law as amended, unless the prosecuting attorney chooses not to pursue such a sentence.

Severability and Savings Clause

If any Hard 50 sentence is held to be unconstitutional, the court having jurisdiction over the person previously sentenced will cause the person to be brought before the court to sentence the person to the maximum term of imprisonment otherwise provided by law. The bill also includes a severability clause, which states the invalidity of any provision or provisions of this section or the application thereof to any person or circumstances does not affect the other provisions or applications of this section.

Finally, the bill amends the statute outlining aggravating circumstances to replace a reference to "the court" with "the trier of fact" to indicate the jury, rather than the court, will consider the aggravating circumstances, unless the jury is waived.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense of conviction. Substantive amendments that impact the sentence of an offender are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

SENTENCING CONSIDERATIONS

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases, but departures are only legislatively authorized when the sentencing court properly follows statutory departure procedures. K.S.A. 2013 Supp. 21-6802.

SENTENCING GUIDELINES AND GRIDS

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. K.S.A. 21-4701 *et seq.* The revised KSGA may be found at K.S.A. 2013 Supp. 21-6801 *et seq.*, effective July 1, 2013. The KSGA provides for determinate sentencing based on sentencing charts or "grids." Each sentencing grid is a two-dimensional crime severity and criminal history classification tool. The grid's vertical axis is the crime severity scale which classifies current crimes of conviction. The grid's horizontal axis is the criminal history scale which classifies criminal histories. The provisions for the nondrug crime grid are found in K.S.A. 2013 Supp. 21-6804. The provisions for the drug crime grid are found in K.S.A. 2013 Supp. 21-6805. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid block at the intersection of the severity level of the crime of conviction and the offender's criminal history score provides the presumed sentencing range, and includes prescribed aggravated, standard and mitigated sentences in months. Each grid also contains a dispositional line: grid blocks above the line presume a sentence of imprisonment; grid blocks below the line presume a sentence of probation. Each grid also includes border blocks or boxes, which are above the dispositional line and therefore presume imprisonment, but which provide that the court may impose an optional nonprison sentence, i.e., probation. See K.S.A. 2013 Supp. 21-6804 and K.S.A. 2013 Supp. 21-6805. The grids can be found in Appendix E, and are the final two pages of this Manual.

DRUG GRID AND NONDRUG GRID

There are two grids used for sentencing of felony convictions.

The drug grid is used for sentencing of all drug crimes under article 57 of chapter 21 of the Kansas Statutes Annotated, except for K.S.A. 2013 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714 and subsections of 21-5710(3)(A) and (4)(B), which are sentenced pursuant to the nondrug grid. Prior versions of the act were found in K.S.A. 65-4101 *et seq*., then briefly in K.S.A. 21-36a01 *et seq*., before being transferred to their current location in K.S.A. 2013 Supp. 21-5701 *et seq.*
The nondrug grid is used for sentencing of all other felony crimes.

The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains five severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line the grid blocks are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that may have lines passing through them, or, in this manual, darker shading, which are referred to as "border boxes." The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains seven border boxes in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C and 5-D. See K.S.A. 2013 Supp. 21-6804 and 21-6805. The court has the power to grant border box probation without departing from the grid (which otherwise would require a finding of substantial and compelling reasons) if the court makes the following findings on the record: (1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and (2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or (3) the nonprison sanction will serve community safety interests by promoting offender reformation.

GRID BLOCKS

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2013 Supp. 21-6804 and 21-6805.

GENERAL RULES FOR DETERMINING SEVERITY LEVELS

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. K.S.A. 2013 Supp. 21-6807(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consisted of four levels of crimes between July 1, 1993 and July 1, 2012. On and after July 1, 2012, there are five levels of drug crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 5 is used to categorize the least severe crimes. K.S.A. 2013 Supp. 21-6808(a).

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. K.S.A. 2013 Supp. 21-6807(c)(1);
- Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. K.S.A. 2013 Supp. 21-6807(c)(2); and

- All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 2013 Supp. 21-6807(c)(3).

All felony crimes, with the exception of off-grid crimes and nongrid crimes such as felony driving under the influence (K.S.A. 8-1567), felony test refusal (K.S.A. 2013 Supp. 8-1025), felony domestic battery (K.S.A. 2013 Supp. 21-5414), and animal cruelty (K.S.A. 2013 Supp. 21-6412 and 21-6416) should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All felonies and misdemeanors are listed in Appendix D of this Manual numerically by statute number.

OFF-GRID CRIMES

Off-grid offenses, by definition, are not subject to the classifications of the KSGA. Off-grid crimes include the most serious of criminal offenses:

- Capital murder (K.S.A. 2013 Supp. 21-5401),
- Murder in the first degree (K.S.A. 2013 Supp. 21-5402),
- Treason (K.S.A. 2013 Supp. 21-5901),
- Terrorism (K.S.A. 2013 Supp. 21-5422),
- Illegal use of Weapons of Mass Destruction (K.S.A. 2013 Supp. 21-5422) and
- Jessica's Law sex offenses involving victims less than 14 years of age and offenders 18 years of age or older are designated as off-grid person crimes. (K.S.A. 2013 Supp. 21-6627)

For such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 2013 Supp. 21-6806. However, such a life sentence does not necessarily mean that the offender will remain imprisoned for the remainder of the offender's life. Offenders who commit off-grid crimes and are released from prison are placed on supervised parole.

CAPITAL MURDER

Offenders who commit capital murder may be sentenced to death pursuant to K.S.A. 2013 Supp. 21-6617. Offenders who are not sentenced to death are sentenced to imprisonment for life without the possibility of parole. However, if the crime of capital murder was committed prior to July 1, 2004, and the death penalty was not imposed, the mandatory minimum term of imprisonment would be 25 years unless aggravating factors were found to outweigh any mitigating ones. In that case, the term would be either 40 or 50 years. K.S.A. 2013 Supp. 21-6620.

MANDATORY MINIMUMS

Generally, an offender will become eligible for parole after serving a mandatory minimum term of years in confinement. The exceptions are for aggravated habitual sex offenders and capital murder, which carry life sentences without the possibility of parole.

Premeditated First Degree Murder

A person convicted of premeditated first-degree murder will be eligible for parole after serving 25 years in confinement unless the jury finds that aggravating circumstances exist and the court finds that such aggravating circumstances are not outweighed by any mitigating circumstances. In that

case, the person shall serve 40 (for crimes committed prior to July 1, 1999) or 50 years (for crimes committed on or after July 1, 1999) pursuant to K.S.A. 2013 Supp. 21-6623 before becoming eligible for parole, and is not entitled to good time credit. See K.S.A. 2013 Supp. 22-3717(b)(1) K.S.A. 2013 Supp. 21-6620(b), (d) and 21-6623.

For crimes committed on or after July 1, 2006, the mandatory minimum shall not apply if the guidelines sentence is greater. Under such circumstances, the guidelines sentence shall be imposed.

Felony Murder and Treason
Felony murder and treason carry terms of life imprisonment with eligibility for parole after serving 15 years for crimes committed after July 1, 1993 but prior to July 1, 1999, and 20 years for crimes committed on or after July 1, 1999. K.S.A. 2013 Supp. 22-3717(b)(2).

Jessica's Law Sex Offenses
In 2006, Kansas' version of Jessica's Law was enacted and designated certain sex offenses involving victims less than 14 years of age and offenders 18 years of age or older as off-grid felonies. If an offender is convicted of one of these off-grid sex offenses, the sentence shall be imprisonment for life pursuant to with a mandatory minimum term of imprisonment of 25 years before parole eligibility on the first such sex offense, or a mandatory minimum term of 40 years on a second such offense. K.S.A. 2013 Supp. 21-6627.

Where a mandatory sentence of 25 or 40 years could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 300 or 480 months, respectively. In that case, the mandatory minimum will be the sentence as provided by the guidelines grid. K.S.A. 2013 Supp. 21-6627(b)(2)(B).

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2013 Supp. 21-6627(c).

Upon release from imprisonment, offenders convicted of a crime under Jessica's Law will be subject to electronic monitoring for the remainder of the person's life and shall reimburse the state for all or part of the cost of such monitoring.. K.S.A. 2013 Supp. 22-3717(u).

Juvenile Offenders
The death penalty and the sentence of life imprisonment without parole do not apply to juveniles people who were under the age of 18 at the time they committed capital murder. K.S.A. 2013 Supp. 21-6618 and 21-6622. Juveniles who are prosecuted as adults may be subject to a mandatory minimum term of imprisonment. K.S.A. 2013 Supp. 21-6620.

Offenders with Intellectual Disability
Offenders who are convicted of capital murder or premeditated first degree murder who are determined to have an intellectual disability may not be sentenced to a death, life without parole or a mandatory minimum sentence. K.S.A. 2013 Supp. 21-6622.

NONGRID CRIMES

Certain felony offenses are classified as nongrid offenses, (not to be confused with off-grid offenses) which are not assigned a severity level and are not subject to punishment pursuant to the sentencing grid. These offenses each contain specific penalties and other provisions within their respective statutes. Each

of these crimes has a corresponding special sentencing rule which must be checked on the Special Rules Supplemental Page of the Journal Entry and Presentence Investigation Report when applicable.
These crimes are:

- felony driving under the influence, K.S.A. 8-1567, (Special Rule #6)
- felony test refusal, K.S.A. 2013 Supp. 8-1025, (Special Rule #39)
- felony domestic battery, K.S.A. 2013 Supp. 21-5414, (Special Rule #8)
- animal cruelty, K.S.A. 2013 Supp. 21-6412 and harming or killing certain dogs, K.S.A. 2013 Supp. 21-6416. (Special Rule #21)

CRIMINAL HISTORY

Criminal history, except as provided in each statute for determining whether the crime is the second, third, fourth or subsequent such offense, are not relevant to the punishment for nongrid offenses.

DUI

Certain convictions, including diversions, shall be counted in determining whether the DUI conviction is the second, third, fourth or greater. These convictions include:

- DUI occurring on or after July 1, 2001,
- test refusal, K.S.A. 8-1025,
- driving a commercial motor vehicle under the influence, K.S.A. 8-2,144,
- operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131,
- involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or subsection (a)(3) of K.S.A. 2012 Supp. 21-5405,and
- aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567,
- a violation of an ordinance of any city, military justice code or resolution of any county which prohibits DUI. K.S.A. 8-1567(i).

Test Refusal

For the purpose of determining whether a test refusal conviction is a first, second, third, fourth or subsequent conviction the following convictions and diversions shall be taken into account:

(1) Convictions occurring on or after July 1, 2001 AND when such person was 18 years of age or older for a violation of K.S.A. 8-1567,

(2) any convictions or diversions which occurred when such person was 18 years of age or older:

(A) K.S.A. 8-1025

(B) driving a commercial motor vehicle under the influence, K.S.A. 8-2,144,

(C) operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131,

(D) involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or subsection (a)(3) of K.S.A. 2012 Supp. 21-5405,

(E) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and a violation of an ordinance of any city, military justice code or resolution of any county which prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations. K.S.A. 2013 Supp. 8-1025(h).

Domestic Battery

For the purpose of determining whether the domestic battery conviction is a first, second, third or

subsequent conviction, only convictions and diversions within the previous 5 years shall be taken into account. K.S.A. 2013 Supp. 21-5414(c)(2).

DIVERSIONS

DUI and Test Refusal

A diversion agreement cannot be entered into for a DUI or DUI test refusal violation if: the defendant has previously participated in a diversion for DUI; has previously been convicted of or pleaded *nolo contendere* to a DUI; or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 2013 Supp. 22-2908(b)(1).

A diversion agreement cannot be entered into for a DUI test refusal violation more than once in a person's lifetime. K.S.A. 2013 Supp. 8-1025(h)(7).

Domestic Violence Offenses

A diversion agreement cannot be entered into where the complaint alleges a domestic violence offense, as defined in K.S.A 2013 Supp. 21-5111, and the defendant has participated in two or more diversions in the previous five year period upon complaints alleging a domestic violence offense. K.S.A. 2013 Supp. 22-2908(b)(3).

ANTICIPATORY CRIMES

ATTEMPT

Off-grid Crimes

An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1, with the following exceptions:

- An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):

1. Aggravated human trafficking, K.S.A. 2013 Supp. 21-5426(b);
2. Rape, K.S.A. 2013 Supp. 21-5503(a)(3);
3. Aggravated indecent liberties with a child, K.S.A. 2013 Supp. 21-5506(b)(3);
4. Aggravated criminal sodomy, K.S.A. 2013 Supp. 21-5504(b)(1) or (b)(2);
5. Commercial sexual exploitation of a child, K.S.A. 2013 Supp. 21-6422;
6. Sexual exploitation of a child, K.S.A. 2013 Supp. 21-5510(a)(1) or (a)(4);

- The reduction of severity level does not apply to an attempt to commit terrorism as defined in K.S.A. 2013 Supp. 21-5421 or illegal use of weapons of mass destruction as defined in K.S.A. 2013 Supp. 21-5422. - K.S.A. 2013 Supp. 21-5301.

Nondrug Crimes

An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10. K.S.A. 2013 Supp. 21-5301(c)(1).

Drug Crimes

An attempt to commit a felony that prescribes a sentence on the drug grid pursuant to K.S.A. 2013 Supp. 21-5301(d)(1) shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months with the following exception:

- The reduction of a sentence on the drug grid by six months for an attempted crime does not apply

in cases involving an attempt to manufacture a controlled substance under K.S.A. 2013 Supp. 21-5703. K.S.A. 2013 Supp. 21-5301(d)(2).

Misdemeanors

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. K.S.A. 2013 Supp. 21-5301(e). An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. K.S.A. 2013 Supp. 21-5301(e). An attempt to commit a class B or C misdemeanor is a class C misdemeanor. K.S.A. 2013 Supp. 21-5301(f).

Crimes where Attempt is an Element

There are certain crimes where an attempt constitutes the completed crime. In such crimes, the statutory definition will include an attempt as a means, or alternate means, of completing the crime. For example, DUI, K.S.A. 8-1567, says "No person shall operate or attempt to operate any vehicle…" In such cases, the completed crime may be charged based on the conduct described, which will not be subject to the reduction in severity level. Other such instances include K.S.A. 2013 Supp. 21-5428 - blackmail, 21-5508 - indecent solicitation of a child, and 21-5909 - witness intimidation.

CONSPIRACY

Off-grid Crimes

Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2, with the following exceptions:

- Conspiracy to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):

1. Aggravated human trafficking, as K.S.A. 2013 Supp. 21-5426(b);
2. Rape, K.S.A. 2013 Supp. 21-5503(a)(3);
3. Aggravated indecent liberties with a child, K.S.A. 2013 Supp. 21-5506(b)(3);
4. Aggravated criminal sodomy, K.S.A. 2013 Supp. 21-5504(b)(1) or (b)(2);
5. Commercial sexual exploitation of a child, K.S.A. 2013 Supp. 21-6422;
6. Sexual exploitation of a child, K.S.A. 2013 Supp. 21-5510(a)(1) or (a)(4);

- The reduction of severity level does not apply to conspiracy to commit terrorism as defined in K.S.A. 2013 Supp. 21-5421, illegal use of weapons of mass destruction as defined in K.S.A. 2013 Supp. 21-5422, or violation of the Kansas racketeer influenced and corrupt organization act, K.S.A. 2013 Supp. 21-6327 *et seq.* K.S.A. 2013 Supp. 21-5302.

Nondrug Crimes

Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10. K.S.A. 2013 Supp. 21-5302(d)(1).

Drug Crimes

Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2013 Supp. 21-5302(d).

Misdemeanors

Conspiracy to commit a misdemeanor is a class C misdemeanor. K.S.A. 2013 Supp. 21-5302(e).

SOLICITATION

Off-grid Crimes

Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3, with the following exceptions:

- Criminal solicitation to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):

1. Aggravated human trafficking, K.S.A. 2013 Supp. 21-5426(b);
2. Rape, K.S.A. 2013 Supp. 21-5503(a)(3);
3. Aggravated indecent liberties with a child, K.S.A. 2013 Supp. 21-5506(b)(3);
4. Aggravated criminal sodomy, K.S.A. 2013 Supp. 21-5504(b)(1) or (b)(2);
5. Commercial sexual exploitation of a child, K.S.A. 2013 Supp. 21-6422;
6. Sexual exploitation of a child, K.S.A. 2013 Supp. 21-5510(a)(1) or (a)(4);

- The reduction of severity level does not apply to criminal solicitation to commit terrorism as defined in K.S.A. 2013 Supp. 21-5421 or illegal use of weapons of mass destruction as defined in K.S.A. 2013 Supp. 21-5422. K.S.A. 2013 Supp. 21-5303.

Nondrug Crimes

Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10. K.S.A. 2013 Supp. 21-5303(d)(1).

Drug Crimes

Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months. K.S.A. 2013 Supp. 21-5303(e).

DRUG DISTRIBUTION AND CULTIVATION CRIMES

DRUG DISTRIBUTION

Most drug distribution and cultivation crimes are punished on the drug grid according to the type and amount of substance distributed, possessed with the intent to distribute, or cultivated. The one exception is distribution of drugs listed in K.S.A. 65-4113 (Schedule V), which is not punished according to amount. It is either a Class A person misdemeanor, or if distributed to a minor, a nondrug severity level 7 person felony.

Distributing or possessing with intent to distribute a controlled substance within 1000 feet of school property shall increase the severity level by one level. For example, distributing 3.5 grams of heroin within 1000 feet of a school would be a level 1 drug felony.

The following tables show the amount of each drug and amount, along with the corresponding severity level of punishment. Certain substances may be measured according to "dosage units", which include discrete units such as pills, capsules and microdots. K.S.A. 2013 Supp. 21-5705.

Heroin/Meth	
Amount	**SL**
Less than 1 gram	4
1 gram but less than 3.5 grams	3
3.5 grams but less than 100 grams	2
100 grams or more	1

Marijuana	
Amount	**SL**
Less than 25 grams	4
25 grams but less than 450 grams	3
450 grams but less than 30 kilograms	2
30 kilograms or more	1

Dosage Unit	
Amount	**SL**
Less than 10 units	4
10 units but less than 100 units	3
100 units but less than 1,000 units	2
1,000 units or more	1

All Others	
Amount	**SL**
Less than 3.5 grams	4
3.5 grams but less than 100 grams	3
100 grams but less than 1 kilogram	2
1 kilogram or more	1

There is a rebuttable presumption of intent to distribute when the offender possesses the following amounts, or greater, of the following controlled substances. The burden to overcome this rebuttable presumption is upon the defendant. The quantities at which the rebuttable presumption applies are as follows:

Type of Drug	**Amount**
Marijuana	450 grams
Heroin	3.5 grams
Methamphetamine	3.5 grams
Any other drug	100 grams
Dosage Units	100

See K.S.A. 2013 Supp. 21-5705(e).

DRUG CULTIVATION

It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in K.S.A. 2013 Supp. 21-5705(a). The severity level for drug cultivation crimes are as follows:

Number of Plants	**Severity Level**
More than 4 but less than 50	3
50 or more but less than 100	2
100 or more	1

See K.S.A. 2013 Supp. 21-5705(d)(7).

CHAPTER II: PROCEDURE PRIOR TO SENTENCING

DETERMINATION OF THE DATE OF OFFENSE: APPLICATION TO THE SENTENCING GUIDELINES

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 2013 Supp. 21-6802.

The date of offense controls selection of the appropriate journal entry form. Each year the Kansas Sentencing Commission modifies the Presentence Investigation Report form, the Journal Entry of Judgment form and the Journal Entry of Probation Revocation form to comport with the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a PSI or journal entry form make sure that the year of the form corresponds with the laws in effect for the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2000 Journal entry form. For an offense committed October 7, 1996, the 1996 Journal entry form should be completed. Forms from prior years may be found at the Kansas Sentencing Commission website: www.sentencing.ks.gov/forms.

CHARGING DOCUMENTS

All charging documents filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is sub-classified into different versions of the same offense that have been assigned different severity levels, the charge should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the charging document. See K.S.A. 2013 Supp. 22-3201 for the requisites of a complaint, indictment or information.

CONSOLIDATION

Consolidation for trial of separate indictments or informations. The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment. K.S.A. 22-3203.

FINGERPRINTING

MUNICIPAL COURT DUTIES

The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2013 Supp. 21-5412. See K.S.A. 2013 Supp. 12-4517(a).

LAW ENFORCEMENT DUTIES

Every sheriff, police department, or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions of a person who is arrested if the person:

- is wanted for the commission of a felony. On or after July 1, 1993, fingerprints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2013 Supp. 21-5412;
- is believed to be a fugitive from justice;
- may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;
- is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;
- is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or
- is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

See K.S.A. 2013 Supp. 21-2501(a).

COUNTY/DISTRICT COURT DUTIES

The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed, fingerprinted, and palm printed. See K.S.A. 2013 Supp. 21-2501(b).

JUVENILE COURT DUTIES

Fingerprints or photographs shall <u>not</u> be taken of any juvenile who is taken into custody for any purpose, with the following exceptions:

- Fingerprints or photographs of a juvenile may be taken if authorized by the court having jurisdiction;
- Fingerprints and photographs shall be taken of all juvenile offenders adjudicated due to commission of an offense which if committed by an adult would constitute the commission of a felony, a class A or B misdemeanor or assault as defined in K.S.A. 2013 Supp.21-5412(a).
- Fingerprints or photographs of a juvenile may be taken under K.S.A. 2013 Supp. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 2013 Supp. 38-2347; and
- Fingerprints or photographs shall be taken of any juvenile admitted to a juvenile correctional facility
- Photographs may be taken of any juvenile admitted to a juvenile detention facility.

See K.S.A. 2013 Supp. 38-2313.

DNA SAMPLE COLLECTION

Offenders who are convicted of certain crimes or adjudicated of certain juvenile offenses shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided in K.S.A. 21-2511.

OFFICIAL RECORDS

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the Attorney General, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. K.S.A. 21-2501a(a). All law enforcement agencies must file a report of such offenses, on a form approved by the Attorney General, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported, or known to have been committed. K.S.A. 21-2501a(b). All law enforcement agencies must report within 30 days, on forms approved by the Attorney General, any methamphetamine laboratory seizures or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. K.S.A. 21-2501a(c).

PLEA AGREEMENT RULES

PERMISSIBLE PLEAS

Generally the parties may move to dismiss any charges or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. See K.S.A. 2013 Supp. 21-6812.

IMPERMISSIBLE PLEAS

A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 2013 Supp. 21-6812(f).

ACCEPTANCE OF PLEA AND SENTENCING

At the time of acceptance of a plea of guilty or *nolo contendere*, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2013 Supp. 22-3210.

The sentencing court is not bound to follow an agreed sentencing recommendation. It has the discretion to impose up to the maximum sentence in the applicable grid block. See K.S.A. 21-6804(e)(1) and K.S.A. 21-6805(c)(1), and, e.g., *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

Once the guilty or *nolo contendere* plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 2013 Supp. 21-6807(b)(4).

DUI

For a charge of Driving Under the Influence (DUI), no plea bargaining agreement shall be entered into nor approved for the purpose of permitting the person charged to avoid the mandatory penalties

established by the DUI statute or a similar ordinance. A diversion agreement shall not constitute plea bargaining. See K.S.A. 2013 Supp. 8-1567(n).

SB 123 Drug Treatment

In a plea situation, the offender must still have the requisite LSI-R and SASSI score in order to be admitted into the SB 123 program. The court may direct the defendant to undergo criminal risk-need and drug abuse assessments required by K.S.A. 2013 Supp. 21-6824 at any time in order to determine SB 123 drug treatment eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

DIVERSIONS

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, constituting an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony for drug crimes committed on or after July 1, 1993 but before July 1, 2012, or a drug severity level 1, 2, or 3 felony committed on or after July 1, 2012. K.S.A. 2013 Supp. 22-2908(b)(2).

DUI and Test Refusal

A diversion agreement cannot be entered into for a DUI or DUI test refusal violation if: the defendant has previously participated in a diversion for DUI; has previously been convicted of or pleaded *nolo contendere* to a DUI; or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 2013 Supp. 22-2908(b)(1).

A diversion agreement cannot be entered into for a DUI test refusal violation more than once in a person's lifetime. K.S.A. 2013 Supp. 8-1025(h)(7).

Domestic Violence Offenses

A diversion agreement cannot be entered into where the complaint alleges a domestic violence offense, as defined in K.S.A 2013 Supp. 21-5111, and the defendant has participated in two or more diversions in the previous five year period upon complaints alleging a domestic violence offense. K.S.A. 2013 Supp. 22-2908(b)(3).

Wildlife, Parks and Tourism Laws

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife, Parks, and Tourism laws (K.S.A. 2013 Supp. 32-1001 *et. seq*.) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 2013 Supp. 22-2908(c).

DEFERRING SENTENCE PENDING MENTAL EXAMINATION

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. K.S.A. 2013 Supp. 22-3429.

DOMESTIC VIOLENCE OFFENSES

In all criminal cases filed in district or municipal court, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense. K.S.A. 2013 Supp. 22-4616.

If the trier of fact determines that the defendant committed a domestic violence offense, the court shall place a domestic violence designation on the criminal case and the defendant shall be subject to the provisions of subsection (p) of K.S.A. 2013 Supp. 21-6604, and amendments thereto.

The court shall not place a domestic violence designation on the criminal case and the defendant shall not be subject to the provisions of subsection (p) of K.S.A. 2013 Supp. 21-6604, only if the court finds on the record that:

- The defendant has not previously committed a domestic violence offense or participated in a diversion upon a complaint alleging a domestic violence offense; AND
- the domestic violence offense was not used to coerce, control, punish, intimidate or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member. K.S.A. 2013 Supp. 22-4616.

The assessment may be used by the court to determine an appropriate sentence, and shall be provided to the supervising entity after sentencing. The defendant shall be required to pay for the assessment and all subsequent recommendations. K.S.A. 2013 Supp. 21-6604(p).

DOMESTIC BATTERY

The definition of the crime of domestic battery and provisions relating there to, are provided in K.S.A. 2013 Supp. 21-5414.

CHAPTER III: CRIMINAL HISTORY

CRIMINAL HISTORY RULES

The horizontal axis or top of the grid represents the criminal history categories. Nine categories are used to designate prior criminal history. Category A is used to categorize offenders having 3 or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighed more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 2013 Supp. 21-6809.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the nondrug grid and the drug grid. The relative severity of each criminal history category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

Criminal History Category	Descriptive Criminal History
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.
H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

PERSON AND NONPERSON CRIMES

The "person" designation refers to crimes that inflict, or could inflict harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery.

The "nonperson" designation refers generally to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver's license, perjury, etc.

Unclassified Crimes
Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2013 Supp. 21-6810(d)(6).

Drug Crimes
Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 2013 Supp. 21-6811(h).

Anticipatory Crimes
A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 2013 Supp. 21-6811(g).

SELECT MISDEMEANORS

The "select" designation refers to specific weapons violations. A conviction of criminal possession of a firearm as defined in subsection (a)(1) or (a)(5) of K.S.A. 21-4204, prior to its repeal, criminal use of weapons as defined in subsection (a)(10) or (a)(11) of K.S.A. 2013 Supp. 21-6301, and amendments thereto, or unlawful possession of a firearm as in effect on June 30, 2005, and as defined in K.S.A. 21-4218, prior to its repeal, will be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. See K.S.A. 2013 Supp. 21-6811(b).

CRIMINAL HISTORY CATEGORIES

Criminal history is based upon the following types of prior convictions and/or adjudications:
- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson select misdemeanors and comparable municipal ordinance and county resolution violations. K.S.A. 2013 Supp. 21-6810.

All convictions and adjudications, except as otherwise provided, should be included in the offender's criminal history. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction. An offender's criminal history classification is determined using the following rules:
- Only verified prior convictions will be considered and scored. K.S.A. 2013 Supp. 21-6810 (d)(1).

- A prior conviction is any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case, regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 2013 Supp. 21-6810(a).
- The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction. See K.S.A. 2013 Supp. 21-6810(d)(9) and 21-6802(c).

- Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 2013 Supp. 21-6810(c).
- All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 2013 Supp. 21-6810(d)(2).
- Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2013 Supp. 21-6810(d)(6).
- Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 2013 Supp. 21-6810(d)(7).
- Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2013 Supp. 21-6810(d)(8).

INFORMATION NOT RELEVANT TO CRIMINAL HISTORY

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA and should not be recorded on the Criminal History Worksheet.

- **Misdemeanors:** Class B and C nonperson misdemeanor convictions or adjudications are not scored for criminal history purposes and should not be recorded on the criminal history worksheet
- **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, adjudications which have decayed, or arrests not resulting in adjudication.
- **Adults:** Do not include traffic infractions, diversions, contacts with law enforcement, or arrests not resulting in conviction.

PRIOR CONVICTION AS SENTENCE ENHANCEMENT OR ELEMENT OF PRESENT CRIME

If a prior conviction of any crime operates to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, that prior conviction cannot be counted in the offender's criminal history. K.S.A. 2013 Supp. 21-6810(d)(9). Note, however, that prior convictions which elevate the penalty or punishment without raising the severity level of the current crime may also be counted for criminal history purposes.

Additional convictions which are not used as enhancements may be used for criminal history purposes. See *State v. Williams*, 47 Kan.App.2d 102, 272 P.3d 1282 (2012).

Failure to Register as Offender Convictions

A prior conviction that creates the need for registration as a sex, drug or violent offender is an element of the offense of failure to register and may not be counted in determining the criminal history score on conviction of failure to register. See *State v. Pottoroff*, 32 Kan. App. 2d 1161, 96 P.3d 280 (2004).

Aggravated Escape from Custody Convictions

For a conviction of the crime of aggravated escape from custody (K.S.A. 2013 Supp. 21-5911) that requires that the offender be in custody for a felony, such felony is considered an element of the crime and may not be counted in the defendant's criminal history. See *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997).

Tampering with Electronic Monitoring Equipment Convictions

The conviction giving rise to the order requiring the defendant be subjected to electronic monitoring equipment is not an element of the crime of tampering with electronic monitoring equipment and may be counted for criminal history purposes. (K.S.A. 2013 Supp. 21-6322). See *State v. Thacker*, 48 Kan.App.2d 515, 292 P.3d 342 (2013).

JUVENILE ADJUDICATIONS

Except for adjudications that have decayed pursuant to K.S.A. 2013 Supp. 21-6810(d)(3) and (d)(4), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2013 Supp. 21-6811(f).

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 2013 Supp. 22-3212(i).

DECAY

There will be no decay factor applicable to adult convictions. K.S.A. 2013 Supp. 21-6810(d)(3).

The following juvenile adjudications will not decay:

- Juvenile adjudications that would constitute a person felony or off-grid felony if committed by an adult will not decay. K.S.A. 2013 Supp. 21-6810(d)(3)(B)
- For acts committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B, or C felony, if committed by an adult. K.S.A. 2013 Supp. 21-6810(d)(3)(C).
- For acts committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4, or 5 felony, or a drug severity level 1, 2, or 3 felony, for an offense committed on or after July 1, 1993, but prior to July 1, 2012, or a drug severity level 1, 2, 3 or 4 felony for an offense committed on or after July 1, 2012, if committed by an adult. K.S.A. 2013 Supp. (d)(3)(D).

Juvenile adjudications for the following offenses (if committed by an adult) will decay if the current crime of conviction is committed after the offender reaches the age of 25:

- An offense would have been a nonperson class D or class E felony if committed before July 1, 1993,
- A nondrug severity level 6, 7, 8, 9 or 10 nonperson felony;
  - a drug severity level 4 felony if committed on or after July 1, 1993 but prior to July 1, 2012;
  - a drug severity level 5 felony if committed on or after July 1, 2012; or

- a misdemeanor. K.S.A. 2013 Supp. 21-6810(d)(4).

DIVERSIONS

Diversions are not "convictions" and are therefore not included in criminal history, except as otherwise provided by law for current convictions of:

- Involuntary Manslaughter, K.S.A. 2013 Supp. 21-5405(a)(3);
- DUI, K.S.A. 8-1567;
- Test Refusal, K.S.A. 8-1025; and
- Domestic Battery, K.S.A. 2013 Supp. 21-5414.

NONGRID OFFENSES

These offenses each contain specific penalty provisions within their respective statutes. Criminal history, except as provided in each statute for determining whether the crime is the second, third, fourth or subsequent such offense, are not relevant to the punishment for nongrid offenses.
For more information on Nongrid Offenses, please see Chapter II.

PERSON MISDEMEANORS – CONVERSION TO PERSON FELONIES

Class A and B Person Misdemeanors

Prior adult convictions and juvenile adjudications for class A person misdemeanors and class B person misdemeanors convert to person felonies at a rate of 3 to 1. The number entered in this box can be calculated by dividing the number of adult person misdemeanors convictions and/or juvenile person adjudications by three (i.e., the total number ÷ 3). If the resulting number is a fraction, disregard the fractional portion because these figures must be in whole numbers. See K.S.A. 2013 Supp. 21-6811(a).

For example, eight person misdemeanor convictions and/or juvenile person adjudications would be converted to two person felony convictions (i.e., 8 ÷ 3 = 2). Do not count the remaining "unconverted" or fractional person misdemeanor convictions and/or juvenile person adjudications in the felony score. However, the two remaining convictions and/or adjudications in the example should still be listed in the Person Misdemeanor section. See K.S.A. 2013 Supp. 21-6811(a).

The Assault Rule

Every three prior adult convictions or juvenile adjudications of misdemeanor assault (a class C person misdemeanor), as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2013 Supp. 21-5412, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2013 Supp. 21-6811(a).

INVOLUNTARY MANSLAUGHTER AND DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 2013 Supp. 8-1567, or a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits acts described in K.S.A. 2013 Supp.

8-1567, shall count as one person felony for criminal history purposes. K.S.A. 2013 Supp. 21-5405(a)(3) and K.S.A. 2013 Supp. 21-6811(c)(2).

BURGLARY

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling, as described in subsection (a) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(1) of K.S.A. 2013 Supp. 21-5807. K.S.A. 2013 Supp. 21-6811(d)(1)
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling, as described in subsection (b) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(2) of K.S.A. 2013 Supp. 21-5807 or as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in subsection (c) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(3) of K.S.A. 2013 Supp. 21-5807. K.S.A. 2013 Supp. 21-6811(d)(2).

The facts required to classify prior adult convictions or juvenile adjudications for burglary must be established by the State by a preponderance of the evidence. See K.S.A. 2013 Supp. 21-6811(d).

OUT-OF-STATE CONVICTIONS

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification.

Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 2013 Supp. 21-6811(e).

Deferred adjudications and other processes that result in a finding of guilt without punishment from a foreign jurisdiction may be counted in the defendant's criminal history. See *State v. Macias*, 30 Kan.App.2d 79, 39 P.3d 85 (2002). "No matter what lenience another state may wish to show, once we are satisfied that a defendant's factual guilt was established in a foreign state, that prior crime will count in Kansas."

Classification as Felony or Misdemeanor

Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2013 Supp. 21-6811(e). If a crime is a felony in another state, it will be counted as a felony in Kansas. The facts required to classify out-of-state adult convictions and juvenile adjudications must be established by the State by a preponderance of the evidence. K.S.A. 2013 Supp. 21-6811(e).

The Legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors, such as a military proceeding. *State v. Hernandez* 24 Kan. App. 2d 285, 286-289, 944 P.2d 188, 192-193 (1997).

Classification as Person or Nonperson Crime

When determining whether the out-of-state offense is a person or nonperson offense, the plain language of K.S.A. 2013 Supp. 21-6811(e) requires the sentencing court to consider whether Kansas

has an offense comparable to the out-of-state offense. See *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003). A comparable offense need not contain elements identical to those of the out-of-state crime, but must be similar in nature and cover a similar type of criminal conduct. *State v. Schultz*, 22 Kan. App. 2d 60, 62, 911 P.2d 1119 (1996).

The court may use any comparable Kansas offense, regardless of whether the crime is a felony or a misdemeanor. For example, if the out-of-state conviction is a misdemeanor, the court could use a Kansas felony as the comparable crime in order to determine if the conviction is scored as a nonperson or person crime. *State v.* LaGrange, 21 Kan.App.2d 477, 901 P.2d 44 (1995).

If Kansas has no comparable offense, the sentencing court must classify the out-of-state conviction as a nonperson crime. K.S.A. 2013 Supp. 21-6811(e).

Comparable Offenses - Examples

The crime of second-degree burglary in Missouri applies when the structure involved is "a building or inhabitable structure." Mo.Rev.Stat. § 569.170.1 (1994). An "inhabitable structure" is defined in Mo.Rev.Stat. § 569.010(2) (1994), in pertinent part, as "a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling." (Emphasis *63 added.) Thus, under the Missouri burglary statute, a gas station would be an "inhabitable structure" because business is carried on there.

In contrast, the Kansas burglary statute distinguishes between structures which are or are not "dwellings." According to K.S.A.1994 Supp. 21-3110(7), [now K.S.A. 2013 Supp. 21-5111] 'dwelling' means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence." From these definitions, it is clear that normally a gas station would not be considered a "dwelling" as contemplated by our legislature absent some proof that the gas station either is used or intended for use as a human habitation, home, or residence. *State v. Schultz*, 22 Kan.App.2d 60, 911 P.2d 1119 (1996).

See also, *State v. Barajas*, 43 Kan. App. 2d 639, 230 P.3d 783 (2010).

Military Convictions

When military convictions are at issue, "a specification is the allegation of a distinct offense in support of the general charge, and is comparable to a count in a civilian indictment." *Hunsaker v. Ridgely*, 85 F. Supp. 757, 758 (S.D.Me. 1949), cited in *State v. Swilley*, 25 Kan. App. 2d 492, 967 P.2d 339 (1998).

LEAVING THE SCENE OF AN ACCIDENT

If the current crime of conviction is leaving the scene of an accident when the accident involves property damage of $1000 or more, great bodily harm or the death of any person, (K.S.A. 8-1602(b)(2),(3) and (4)) the following convictions, if for an act committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;

- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- Subsection (a)(3) of K.S.A. 2013 Supp. 21-5405, involuntary manslaughter committed while DUI;
- K.S.A. 2013 Supp. 21-5406, vehicular homicide; or
- A violation of a city ordinance or law of another state which would also constitute a violation of such sections. K.S.A. 2013 Supp. 21-6811(i).

PROOF OF CRIMINAL HISTORY

CRIMINAL HISTORY WORKSHEET

Except as provided in K.S.A. 2013 Supp. 21-6814, the sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. K.S.A. 2013 Supp. 21-6813(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history. The sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. If the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of evidence. K.S.A. 2013 Supp. 21-6814.

The sentencing court has the duty and authority to correct any errors on the criminal history worksheet.

UNCOUNSELED MISDEMEANOR CONVICTIONS

A person accused of a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation. *State v. Long,* Kan.App.3d, 225 P.3d 744 (2010). A previous misdemeanor conviction in which the defendant was denied counsel and sentenced to a term of imprisonment, even if such term of imprisonment was suspended or conditioned upon a nonprison sanction, may not be counted in the offender's criminal history. However, if the offender's sentence did not include a term of imprisonment, the previous conviction may be counted in the offender's criminal history.

CHAPTER IV: PRESENTENCE INVESTIGATION REPORTS

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form along with the instructions for completing the form are contained in Appendix A of this Manual.

REQUIREMENTS

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2013 Supp. 21-6813(a). All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. K.S.A. 2013 Supp. 21-6813(g). This format must be used to provide consistency statewide.

A copy of the PSI, including the Criminal History Worksheet, and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission for each felony case within thirty days after sentencing. K.S.A. 2013 Supp. 22-3439(a).

Field services officers are responsible for preparing the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender.

The Criminal History Worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2013 Supp. 21-6814(f).

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, shall be limited to the following information:

- A summary of the factual circumstances of the crime or crimes of conviction.
- If the defendant desires to provide one, a summary of the defendant's version of the crime.
- When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
- An appropriate classification of each crime of conviction on the crime severity scale.
- A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and copies of any

available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.

- Proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.
- If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity.
- If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.
- For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 2013 Supp. 21-5706, and meet the requirements of K.S.A. 2013 Supp. 21-6824 (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 2013 Supp. 21-6824.

The PSI will become part of the court record and is accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports, drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 2013 Supp. 75-5220. K.S.A. 2013 Supp. 21-6813(c).

If the offense requires the offender to register under the Kansas Offender Registration Act (K.S.A. 2013 Supp. 22-4901 *et seq.*), the PSI Offender Registration Supplement should be filled out.

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2013 Supp. 21-6813(d).

The PSI will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2013 Supp. 21-6813(e).

CHAPTER V: SENTENCING

SENTENCING RANGE

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the "standard" number of months, the upper number in the grid block is the "aggravated" number of months, and the lower number in the grid block is the "mitigated" number of months.

If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 2013 Supp. 21-6804.

SENTENCING OPTIONS

The sentencing court may impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.

A sentence to any term, including an aggravated term, within the range in a Kansas sentencing guideline presumptive grid box is constitutional. Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 2013 Supp. 21-6820(c). Appellate courts lack jurisdiction even if the sentence is to the longest term in the presumptive grid box for a defendant's convictions. *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may impose a departure when substantial and compelling circumstances exist. See K.S.A. 2013 Supp. 21-6804 and K.S.A. 2013 Supp. 21-6815.

AUTHORIZED DISPOSITIONS

Whenever a person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. K.S.A. 2013 Supp. 21-6604

The court may:

- Commit the defendant to the custody of the Secretary of Corrections if the current crime is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment;
- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor or a nongrid felony;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;

- Impose fines applicable to the offense that may be paid in installments if authorized by the court. The court may order performance of community service in lieu of payment of any fine imposed. The credit on the fine imposed will be applied at a rate of $5 for each full hour of community service performed;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2013 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- *Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program; * This program is currently unavailable as a sentencing option
- Assign the defendant to house arrest pursuant to K.S.A. 2013 Supp. 21-6609;
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (c) of K.S.A. 2013 Supp. 21-6602;
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 2013 Supp. 22-4529 unless waived by the court;
- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369;
- Order the defendant to a work release program, outside the control of the Department of Corrections, if the defendant is convicted of a felony, under K.S.A. 2013 Supp. 21-6804(i), or a misdemeanor. If work release is imposed for a second or third and subsequent DUI, the offender shall be required to serve a total of 120 or 240 hours of confinement, respectively. Such hours shall be a mandatory 48 consecutive hours confinement followed by confinement hours at the end of and continuing to the beginning of the offender's work day;
- Order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 2013 Supp. 22-2802;
- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant's crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by subsection (d) of K.S.A. 2013 Supp. 21-6602;
- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent's defense services to provide counsel and other defense services to the defendant;
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute; and
- For Jessica's Law cases, in addition to any other penalty or disposition imposed by law, for any defendant sentenced to imprisonment pursuant to K.S.A. 21-4643, prior to its repeal, or K.S.A. 2013 Supp. 21-6627, and amendments thereto, for crimes committed on or after July 1, 2006, the court shall order that the defendant be electronically monitored upon release from imprisonment for the duration of the defendant's natural life and that the defendant shall reimburse the state for all or part of the cost of such monitoring as determined by the prisoner review board.

FINES

Felony, misdemeanor and infraction fines are as follows in K.S.A. 2013 Supp. 21-6611:

Off-grid and drug severity level 1 or drug severity level 1 or 2 if committed on or after July 1, 2012	≤ $500,000
Nondrug severity level 1 through 5 and drug severity level 3 and 4 or drug severity level 3 or 4 if committed on or after July 1, 2012	≤ $300,000
Nondrug severity level 6 through 10 and drug severity level 4 or drug severity level 5 if committed on or after July 1, 2012	≤ $100,000
Class A misdemeanor	≤ $2,500
Class B misdemeanor	≤ $1,000
Class C misdemeanor	≤ $500
Traffic infraction	≤ $500
Cigarette or Tobacco infraction	$25

As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. K.S.A. 2013 Supp. 21-6611(c). In addition, certain offenses have particular fines that are specified by statute.

DUI

The range of mandatory DUI fines is as follows:

- 1st DUI: not less than $750 nor more than $1,000
- 2nd DUI: not less than $1,250 nor more than $1,750
- 3rd DUI: not less than $1,750 nor more than $2,500
- 4th or subsequent DUI: $2,500

Test Refusal

The range of Test Refusal Fines is as follows:

- 1st Offense: not less than $1250 nor more than $1750
- 2nd Offense: not less than $1750 nor more than $2500
- 3rd or Subsequent Offense: $2500

For DUI and Test Refusal cases, $250 from each fine imposed for violations of K.S.A. 2013 Supp. 8-2,144, 8-1025 and 8-1567 shall be remitted to the state treasurer for deposit into the Community Corrections Supervision Fund. K.S.A. 2013 Supp. 8-2,144(p), 8-1025(n) and 8-1567(r)(2).

Human Trafficking Crimes

Offenders who are convicted of Promoting the Sale of Sexual Relations or Commercial Sexual Exploitation of a Child shall pay a fine of not less than $2500 nor more than $5000, and upon a second or subsequent offense, shall be fined not less than $5000. Offenders who are convicted of Buying Sexual Relations shall pay a fine of $2500 for a first offense, and not less than $5000 upon a second or subsequent offense. All such fines will be remitted state treasurer for deposit into the Human Trafficking Victim Assistance Fund. K.S.A. 2013 Supp. 21-6420, 21-6421 and 21-6422.

FEES

BIDS Attorney Fees:

Pursuant K.S.A. 2013 Supp. 21-6604(i) and 21-6606(c)(4), the court shall order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigents'

defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less. Include the BIDS Attorney Fee ordered and check the box if the fee was waived.

Children's Advocacy Center Fund Fee

On and after July 1, 2013, any defendant convicted of a crime under chapter 21 of the Kansas Statutes Annotated in which a minor is a victim, shall pay an assessment fee in the amount of $400 to the clerk of the district court. All moneys received pursuant to this section shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the children's advocacy center fund. K.S.A. 20-370

SB 123 Assessment and Program Fees

Each offender who receives an SB 123 assessment should be ordered to pay the $200 SB 123 assessment fee, regardless of whether they undergo SB 123 treatment. If SB 123 treatment is ordered, the SB 123 Assessment Fee and the $100 SB 123 Reimbursement should be ordered together for a total of $300.

Domestic Violence Program Fee

If a judicial district creates a local fund, the court may impose a fee against any defendant for crimes involving a family or household member as provided in K.S.A. 2012 Supp. 21-5414 and against any defendant found to have committed a domestic violence offense pursuant to K.S.A. 2012 Supp. 22-4616. The chief judge of each judicial district where such fee is imposed shall set the amount of such fee by rules adopted in such judicial district in an amount not to exceed $100 per case. K.S.A. 20-369.

DNA Database Fee

K.S.A. 75-724. (a) Any person convicted or adjudicated of an offense that, pursuant to K.S.A. 21-2511, and amendments thereto, requires submission of a DNA sample shall pay a separate court cost of $200 as a Kansas bureau of investigation DNA database fee upon conviction or adjudication.

KBI Lab Fee

The court shall order any person convicted or diverted of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, or a violation of K.S.A. 8-2,144 (Commercial DUI) or 8-1567 (DUI), or a violation of a municipal ordinance or county resolution prohibiting the acts prohibited by such statutes, unless the municipality or county has an agreement with the laboratory providing services that sets a restitution amount to be paid by the person that is directly related to the cost of laboratory services, to pay a separate court cost of $400 for every individual offense if forensic science or laboratory services or forensic computer examination services are provided in connection with the investigation by the Kansas bureau of investigation; the Sedgwick county regional forensic science center; the Johnson county sheriff's laboratory; the heart of America

regional computer forensics laboratory; or the Wichita-Sedgwick county computer forensics crimes unit. Such fees shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 28-176

Correctional Supervision Fee
The court shall order, as a condition of probation, suspension of sentence or assignment to a community corrections program, the offender to pay a correctional supervision fee of $60 if the person was convicted of a misdemeanor, or a fee of $120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount. K.S.A. 21-6607(c)(3).

Booking/Fingerprint Fee
Any person convicted or diverted, or adjudicated or diverted under a preadjudication program, pursuant to K.S.A. 22-2906 et seq., K.S.A. 2012 Supp. 38-2346 et seq., or 12-4414 et seq., of a misdemeanor or felony where fingerprints are required pursuant to K.S.A. 21-2501, shall pay a separate court cost, not exceed $45, if the board of county commissioners or by the governing body of a city, where a city operates a detention facility, votes to adopt such a fee as a booking or processing fee for each complaint.

Such fee shall be in addition to and not in substitution for any and all fines and penalties otherwise provided for by law for such offense. K.S.A. 12-16,119.

Drug/Alcohol Evaluation Fee
Offenders who are convicted of a first or second violation of K.S.A. 8-2,144 (commercial DUI), a first violation of 8-1025 (test refusal) or a first or second violation of 8-1567 (DUI) are required to undergo a drug evaluation and pay a fee of $150. K.S.A. 8-1008.
Juveniles or adults convicted or adjudicated of having committed, while under 21 years of age, a misdemeanor under K.S.A. 8-1599, 41-719 or 41-727 or K.S.A. 2012 Supp. 21-5701 through 21-5717, shall be ordered to submit to an alcohol and drug evaluation and pay a fee of $150. If the court finds that the person is indigent, the fee may be waived. K.S.A. 2013 Supp. 21-6602(d)
If the person is 18 or older but less than 21 and is convicted of a violation of K.S.A. 41-727 involving cereal malt beverage, the evaluation and fee are permissive and not mandatory. K.S.A. 2013 Supp. 21-6602(e).

PRESUMPTIVE NONPRISON

In a presumptive nonprison case, the sentencing court shall pronounce the duration of the nonprison sanction AND the underlying prison sentence. See K.S.A. 2013 Supp. 21-6804(e)(3), 21-6805(c)(3) and K.S.A. 2013 Supp. 21-6806(b).

In nonprison cases, the offender will not have to serve a period of postrelease upon successful completion of the nonprison sanction. However, for crimes committed on and after July 1, 2013, an offender who is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes their underlying prison term while serving a 120/180 day graduated sanction, the offender shall be required to complete a period of postrelease supervision. K.S.A. 2013 Supp. 22-3716(e).

PROBATION

Duration of Probation for Felonies

For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels is as follows (K.S.A. 2013 Supp. 21-6608(c)):

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤ 18	≤ 12	≤ 12
Drug (prior to July 1, 2012	36	36	≤ 18	* ≤ 12						
Drug	36	36	36	≤ 18	* ≤ 12					

* Except for SB 123 sentences, where the standard probation term is up to 18 months. K.S.A. 2013 Supp. 21-6608(c)(4).

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7, on the drug grid for severity levels 1 and 2 prior to July 1, 2012 and on the drug grid for severity levels 1 through 3 committed on or after July 1, 2012.

With three exceptions, the total period in all cases shall not exceed 60 months or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2013 Supp. 21-6608(c).

- The first exception is that the sentencing court may modify or extend the period of supervision, pursuant to a modification hearing and a judicial finding of necessity, up to a maximum of 5 years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2013 Supp. 21-6608(c)(8).
- Second, if the defendant is convicted of nonsupport of a child, the period may be extended as long as the responsibility for support continues. K.S.A. 2013 Supp. 21-6608(c)(7).
- Third, if the defendant is ordered to pay full or partial restitution, the period may be extended as long as the amount of restitution ordered has not been paid. K.S.A. 2013 Supp. 21-6608(c)(7). Other unpaid assessments, such as costs, BIDS fee reimbursements, and lab fees are not restitution, and thus the fact that such may remain unpaid does not justify a probation extension under the statute. *State v. Hoffman*, 45 Kan.App.2d 272, 246 P.3d 992 (2011).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid, severity levels 3 and 4 on the drug grid prior to July 1, 2012 and severity levels 4 and 5 on the drug grid committed on or after July 1, 2012. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2013 Supp. 21- 6608. K.S.A. 2013 Supp. 21-6608(c)(5).

Duration of Probation for Misdemeanors

The period of suspension of sentence, probation or assignment to community corrections fixed by the court shall not exceed two years in misdemeanor cases, subject to renewal and extension for additional fixed periods of two years. K.S.A. 2013 Supp. 21-6808(a).

Multiple Probation Sentences
In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2013 Supp. 21-6819(b)(8).

Termination and Presumptive Discharge
A nonprison sentence may be terminated by the court at any time. K.S.A. 2013 Supp. 21-6608(a).
In addition, a probationer who has compliant with all terms of probation for a period of 12 months, has paid all restitution and has a risk assessment level of low risk is eligible for presumptive discharge from probation. The court shall grant such discharge unless they find substantial and compelling reasons for denial. K.S.A. 2013 Supp. 21-6608(d).

Conditions of Probation
Court services and community corrections officers may recommend conditions of probation for offenders who receive a nonprison sentence. A felony offender may be sentenced to up to 60 days in county jail as a condition of probation. K.S.A. 2013 Supp. 21-6604(a)(3).

In addition to any other conditions, the court shall order the defendant to comply with each of the following conditions:

- obey all laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject;
- make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefore;
- pay a correctional supervision fee of $60 if the person was convicted of a misdemeanor or a fee of $120 if the person was convicted of a felony. In any case the amount of the correctional supervision fee specified by this paragraph may be reduced or waived by the judge if the person is unable to pay that amount;
- reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant;
- be subject to searches of the defendant's person, effects, vehicle, residence and property by a court services officer, a community correctional services officer and any other law enforcement officer based on reasonable suspicion of the defendant violating conditions of probation or criminal activity; and
- be subject to random, but reasonable, tests for drug and alcohol consumption as ordered by a court services officer or community correctional services officer.

The court may impose any conditions that the court deems proper, including, but not limited to, requiring that the defendant:
avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;

- avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;
- report to the court services officer or community correctional services officer as directed;

- permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;
- work faithfully at suitable employment insofar as possible;
- remain within the state unless the court grants permission to leave;
- pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;
- support the defendant's dependents;
- reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;
- perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;
- perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days, determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;
- participate in a house arrest program pursuant to K.S.A. 2012 Supp. 21-6609, and amendments thereto;
- order the defendant to pay the administrative fee authorized by K.S.A. 22-4529, and amendments thereto, unless waived by the court; or
- in felony cases, except for violations of K.S.A. 8-1567, and amendments thereto, be confined in a county jail not to exceed 60 days, which need not be served consecutively.

COMMUNITY CORRECTIONS (2000 SENATE BILL 323)

K.S.A. 2013 Supp. 75-5291(a)(2) defines the target population of offenders for placement in a community correctional services program. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

- Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
- Offenders whose sentence falls within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
- Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;
- Offenders convicted of a sex offense as defined in K.S.A. 2013 Supp. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is imposed;
- Offenders who are determined to be "high risk or needs, or both" by the use of a statewide, mandatory, standardized risk assessment tool. The LSI-R has been approved by the KSC as the official risk assessment tool.
- Offenders who are placed in a community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
- Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2013 Supp. 21-6824, SB 123 Drug Treatment.
- Offenders who have been placed in a community correctional services program for supervision by the court for DUI pursuant to K.S.A. 2013 Supp. 8-1567;
- Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund

administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2013 Supp. 75-5291(a)(4).

- A public safety provision also allows direct revocation to prison from supervision by court services for offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 2013 Supp. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2013 Supp. 75-5291(a)(5).

CORRECTIONAL CONSERVATION CAMP*

The court shall consider placement of a defendant in the Labette Correctional Conservation Camp, conservation camps established by the secretary of corrections pursuant to K.S.A. 75-52,127, and amendment thereto, or a community intermediate sanction center under the following circumstances:

- prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012;
- prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2013 Supp. 21-6824, and amendments thereto;
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 5-C, 5-D, 5-E or 5-F of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012, and whose offense does not meet the requirements of K.S.A. 2013 Supp. 21-6824, and amendments thereto; or
- prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or, in grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the sentencing guidelines grid for drug crimes committed prior to July 1, 2012, or in grid blocks 4-E, 4-F, 4-G, 4-H or 4-I of the sentencing guidelines grid for drug crimes committed on or after July 1, 2012.

The defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all of the conservation camp's or a community intermediate sanction center's placement criteria unless the court states on the record the reasons for not placing the defendant in a conservation camp or a community intermediate sanction center. K.S.A. 2013 Supp. 21-6604(g).

**In practice, all the nonprison alternatives provided in K.S.A. 2013 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2013 Supp. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*

BORDER BOXES

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 4-E, 4-F, 4-G, 4-H or 4-I and 5-C, or 5-D of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
- The nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(f) and 21-6805(d).

PRESUMPTIVE IMPRISONMENT

In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. K.S.A. 2013 Supp. 21-6804(e)(2) and 21-6805(c)(2).

GOOD TIME

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of:

- 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% good time for crimes committed on or after April 20, 1995;
- 20% good time for crimes of nondrug severity level 7-10 committed on or after January 1, 2008, crimes of drug severity level 3 or 4 committed on or after July 1, 2008, but prior to July 1, 2012, or crimes of drug severity level 4 or 5 committed on or after July 1, 2012. K.S.A. 2011 Supp. 21-6806(a) and K.S.A. 2012 Supp. 21-6821(b).

Good time credit is specific to the crime of conviction. Offenders convicted of multiple counts will earn good time at the applicable rate for the sentence they are serving.

AGGRAVATED HABITUAL SEX OFFENDERS

Aggravated habitual sex offenders are offenders convicted of a sexually violent crime who have previously been convicted of two or more sexually violent crimes. K.S.A. 2013 Supp. 21-6626. Such offenders will be sentenced to imprisonment for life without the possibility of parole.

EXTENDED JURISDICTION JUVENILE CASES

Under K.S.A. 2013 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2013 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment form must be completed for these cases.** A box is located in the "Special Rule Applicable" section of the adult Journal Entry of Judgment form labeled "Extended Jurisdiction Juvenile Imposed," to indicate that the Journal Entry of

Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases. Full description of the extended jurisdiction prosecution may be found at K.S.A. 2013 Supp. 38-2347.

SPECIAL SENTENCING RULES

PUBLIC SAFETY OFFENSES / FIREARMS FINDING

1. Person Felony Committed With a Firearm
When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(h).

2. Aggravated Battery Against a Law Enforcement Officer
The sentence for the violation of K.S.A. 21-3415, prior to its repeal (aggravated battery against a law enforcement officer), if committed prior to July 1, 2006, which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(g).

3. Aggravated Assault Against a Law Enforcement Officer
The sentence for the violation of subsection (d) of K.S.A. 2011 Supp. 21-5412 (aggravated assault of a law enforcement officer), which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(g).

34. Battery on a Law Enforcement Officer
A special sentencing rule exists for a violation of subsection (c)(2) of K.S.A. 2013 Supp. 21-5413, battery on a law enforcement officer where **bodily harm occurs**. The sentence shall be presumptive imprisonment and shall be served consecutively to any other terms imposed. A law enforcement officer shall include a uniformed or properly identified university campus police, or state, county, or city law enforcement officer, other than a juvenile or adult correctional officer. K.S.A. 2013 Supp. 21-6804(r).

32. Drug Felony Committed - Firearm Carried or Possessed
If the trier of fact makes a finding that the offender carried a firearm to commit a drug felony, or possessed a firearm in furtherance of a drug felony, the sentence imposed shall be enhanced by an additional 6 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 21-6805(g)(1)(A).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid: K.S.A. 2013 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714 and subsections of 21-5710(3)(A) and (4)(B).

33. Drug Felony Committed - Firearm Discharged
If the trier of fact makes a finding that the offender discharged a firearm when committing a drug felony, the sentence imposed shall be enhanced by an additional 18 months imprisonment and such additional sentence shall be presumptive imprisonment. K.S.A. 2013 Supp. 21-6805(g)(1)(B).

This special rule **DOES NOT** apply to crimes sentenced on the nondrug grid: K.S.A. 2013 Supp. 21-5705(d)(6)(B), 21-5707, 21-5708, 21-5713, 21-5714 and subsections of 21-5710(3)(A) and (4)(B).

4. Crime Committed for the Benefit of a Criminal Street Gang
If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(k).

11. Extended Jurisdiction Juvenile Imposed
If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 2013 Supp. 38-2361 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. **An adult felony Journal Entry of Judgment must be completed for these cases**. K.S.A. 2013 Supp. 38-2364.

35. Aggravated Endangering a Child
The sentence for violation of subsection (b) of K.S.A. 2013 Supp. 21-5601 (aggravated endangering of a child), is a nondrug severity 9, person felony, and shall be served consecutively to any other term or terms of imprisonment imposed by the court. Such sentence is not a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-5601(c)(2).

36. Ballistic Resistant Material
If the trier of fact makes a finding that an offender wore or used ballistic resistant material during the commission of, attempt to commit, or flight from any felony, the sentence shall be enhanced by an additional 30 months imprisonment. Such additional sentence shall be presumptive prison and shall be served consecutively to any other term or terms of imprisonment imposed. K.S.A. 2013 Supp. 21-6804(t).

38. Unlawful Sexual Relations
The sentence for a violation of K.S.A. 2013 Supp. 21-5512, and amendments thereto, shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2013 Supp. 21-6804(s).

HABITUAL OR REPEAT OFFENSES

5. Persistent Sex Offender
The sentence for any persistent sex offender, as defined in K.S.A. 2013 Supp. 21-6804(j), whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of

conviction is a severity level 1 or 2 nondrug felony, unless such current conviction is for the crime of rape, K.S.A. 2013 Supp. 21-5503, and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2013 Supp. 21-6804(j).

12. Second or Subsequent Conviction for Manufacture of a Controlled Substance

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2013 Supp. 21-5703, IF the prior conviction was for manufacture of methamphetamine, shall be double the presumptive sentence length. However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6805(e).

1) If both the current and prior convictions do not involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule does not apply.

2) If the prior conviction involved methamphetamine but the current conviction does not, the crime is a drug severity level 2 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

3) If the prior conviction did not involve methamphetamine but the current conviction does, the crime is a drug severity level 1 felony and the special sentencing rule does not apply.

4) If both the current and prior convictions involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

26. Third or Subsequent Conviction for Drug Possession

The sentence for a third or subsequent felony conviction of K.S.A. 2013 Supp. 21-5706 shall be presumed imprisonment if the third or subsequent felony occurred on or after July 1, 2008. If the conviction occurred prior to July 1, 2008, then the sentence shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section, **if** the defendant has previously:

- completed a certified drug abuse program;
- been discharged from a certified drug abuse program; or
- refused to participate in a certified drug abuse program, as provided in K.S.A. 2013 Supp. 75-52,144.

Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2013 Supp. 21-6805(f)(1).

13. Residential Burglary with One Prior Residential, Non-Residence, or Aggravated Burglary Conviction

The sentence for the violation of burglary of a residence, subsection (a) of K.S.A. 21-3715, prior to its repeal, subsection (a)(1) of K.S.A. 2013 Supp. 21-5807, or an attempt or conspiracy to commit such, when the offender has a prior conviction for residential or nonresidential burglary, subsections (a) or (b) of K.S.A. 21-3715, prior to its repeal, subsections (a)(1) or (a)(2) of K.S.A. 2013 Supp. 21-5807 (automobile burglary is not included), aggravated burglary, K.S.A. 21-3716, prior to its repeal, subsection (b) of K.S.A. 2013 Supp. 21-5807, or an attempt or conspiracy to commit such, shall be presumed imprisonment. K.S.A. 2013 Supp. 21-6804(l).

27. Burglary with Two or More Prior Convictions for Theft, Burglary or Aggravated Burglary

The sentence for a violation of burglary, K.S.A. 2013 Supp. 21-5807(a), when the offender has any combination of two or more prior convictions of theft, (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2013 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2013 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to

prison as provided by this section. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2013 Supp. 21-6804(p).

29. Felony Theft with Three or More Prior Convictions for a Felony Theft, Burglary, or Aggravated Burglary

The sentence for a violation of theft of property, K.S.A. 2013 Supp. 21-5801, when the offender has any combination of three or more prior felony convictions for theft (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2013 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2013 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2013 Supp. 21-6804(p).

30. Substance Abuse Underlying Factor

The court may make findings that substance abuse is the underlying factor in the commission of crimes under special rules #27 and #29 above and place the offender in an intensive treatment program for at least 4 months if the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, serve community safety interests and promote offender reformation; return to court upon successful completion. K.S.A. 2013 Supp. 21-6804(p).
**While this option is authorized by statute, it has never been funded and is not, therefore, an available option.*

31. Third or Subsequent Criminal Deprivation of a Motor Vehicle

The sentence for a third or subsequent violation of criminal deprivation of property that is a motor vehicle pursuant to K.S.A. 2013 Supp. 21-5803(b) shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2013 Supp. 21-6804(n).

16. Second Forgery

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. The sentence for a felony violation of K.S.A. 2013 Supp. 21-5823(b)(3) shall be as provided by the specific mandatory sentencing requirements of that statute unless the new conviction places the offender in the criminal history category A or B. In such case, the sentence shall be as for a severity level 8, nonperson felony. K.S.A. 2013 Supp. 21-6804(i).

The specific mandatory sentencing provisions of K.S.A. 2013 Supp. 21-5823 provide that upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or $500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or $1,000. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 2013 Supp. 21-5823(b).

State v. Luttig, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty could not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). However, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2013 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction.

17. Third or Subsequent Conviction for Forgery
Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or $2,500. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 45 day sentence as provided herein. K.S.A. 2013 Supp. 21-5823(b).

State v. Luttig, 40 Kan. App. 2d 1095, 199 P.3d 793 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31, 223 P.3d 774 (2010). As noted above however, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 2013 Supp. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction.

9. Crime Committed While Incarcerated and Serving a Felony Sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony
Under any of these conditions, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2013 Supp. 21-6606 AND if the new crime of conviction is a felony, the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence.

Imposition of a prison sentence for the new crime does not constitute a departure. K.S.A. 2013 Supp. 21-6604(f)(1), and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). See also K.S.A. 2013 Supp. 21-6606(e)(2) (serving indeterminate sentence).

40. Felony Committed after Early Discharge where Offender would have been on Probation or Postrelease Supervision for a Felony
On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2013 Supp. 21-6608(d) or is granted early discharge from postrelease supervision pursuant to K.S.A. 2013 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2013 Supp. 21-6604(f)(2)

28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony
A special rule pertains to juveniles who commit a new felony while incarcerated in a juvenile correctional facility for a crime which if committed by an adult would be a felony. In such instances, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility. K.S.A. 2013 Supp. 21-6604(f)(3).

10. Crime Committed While the Offender is on Release for a Felony Bond
When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 (Conditions of Release) of the Kansas Statutes Annotated, or similar provisions of the laws of

another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2013 Supp. 21-6606 and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2013 Supp. 21-6604(f)(4). However, K.S.A. 2013 Supp. 21-6606(d) indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released. Because of this conflict, a court imposing a consecutive sentence should clarify that consecutive sentencing was done in the exercise of discretion, not because it was mandated.

37. Second or Subsequent Identity Theft or Identity Fraud

The sentence for a violation of identity theft or identity fraud as defined in K.S.A. 2013 Supp. 21-6107, or any attempt or conspiracy to commit such offense, shall be presumptive prison when the offender has a prior conviction for a violation of identity theft under K.S.A. 21-4018, prior to its repeal, or identity theft or identity fraud under this statute, or any attempt or conspiracy to commit such offense. Such sentence is not considered a departure and is not subject to appeal. K.S.A. 2013 Supp. 21-6804(u).

NONGRID OFFENSES

6. Felony DUI

Felony driving under the influence as defined in K.S.A. 2013 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2013 Supp. 21-6804(i). However, for a third or subsequent DUI, an offender is required to serve a mandatory period of one year supervision under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2013 Supp. 8-1567(b)(3).

39. Felony DUI Test Refusal

Felony DUI Test Refusal as defined in K.S.A. 2013 Supp. 8-1025 is an unclassified felony crime that is scored as a severity level 10 nonperson offense. Despite its classification on the grid, the specific sentencing provisions contained within the DUI Test Refusal statute determine the sentence. As with felony DUI, the offender cannot be sent to a state correctional facility to serve the sentence imposed. However, for a second or subsequent conviction for DUI Test Refusal, an offender is required to serve a mandatory period of one year supervision under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2013 Supp. 8-1025(b)(3).

8. Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 2013 Supp. 21-5414(b)(3), is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2013 Supp. 21-6804(i).

21. Animal Cruelty

Felony animal cruelty, as defined in subsections (a)(1), (a)(6) or (b)(2)(B) of K.S.A. 2013 Supp. 21-6412, is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2013 Supp. 21-6412(b)(1) or (b)(2)(B). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2013 Supp. 21-6412 and K.S.A. 2013 Supp. 21-6804(i).

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 2013 Supp. 21-6416(a), is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2013 Supp. 21-6416(b). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2013 Supp. 6804(i).

FINANCE OFFENSES

25. Fraudulent Insurance Act

A fraudulent insurance act shall constitute a severity level 6, nonperson felony if the amount involved is $25,000 or more; a severity level 7, nonperson felony if the amount involved is at least $5,000 but less than $25,000; a severity level 8, nonperson felony if the amount involved is at least $1,000 but less than $5,000; and a class C nonperson misdemeanor if the amount is less than $1,000. Any combination of fraudulent acts occurring within a period of six consecutive months which involves $25,000 or more shall have a presumptive prison sentence of imprisonment regardless of its location on the sentencing grid block. K.S.A. 2013 Supp. 40-2,118(e).

15. Kansas Uniform Securities Act

Any violation of the Kansas Uniform Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of $25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. K.S.A 2013 Supp. 17-12a508(a)(5).

19. Mortgage Business Act

Any person who willfully or knowingly violates any of the provisions of this act, any rule, and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2013 Supp. 9-2203(d).

20. Loan Brokers Act

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993 and resulting in a loss of $25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 50-1013(a).

MULTIPLE CONVICTIONS

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. The sentencing judge may consider the need to

impose an overall sentence that is proportionate to the harm and culpability and shall state on the record if the sentence is to be served concurrently or consecutively. K.S.A. 2013 Supp. 21-6606 and 21-6819(b). If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 2013 Supp. 21-6606(c), (d) and (e).

CONCURRENT AND CONSECUTIVE SENTENCES

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 2013 Supp. 21-6819(a). Consecutive sentencing is generally required when imposing a sentence for:

- a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony; K.S.A. 2013 Supp. 21-6606(c),
- a felony committed while the offender was on felony bond; K.S.A. 2013 Supp. 21-6606(d), (Special Rule #10);
- a knowing or reckless violation of battery against a law enforcement officer; K.S.A. 2013 Supp. 21-6804(r), (Special Rule #34);
- aggravated endangering a child, K.S.A. 2013 Supp. 21-5601, (Special Rule #35)
- a finding that the offender wore ballistic resistant materials, in which the offender shall serve an additional 30 months' imprisonment consecutive to any other sentence, K.S.A. 2013 Supp. 21-6804(t), (Special Rule #36);
- a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 2013 Supp. 21-6606(e)(1); (Special Rule #9);

DETERMINING THE BASE SENTENCE AND PRIMARY CRIME

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 2013 Supp. 21-6819(b)(2) as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. The primary on-grid offense shall be sentenced with full criminal history and forms the base sentence for the guidelines sentence. The off-grid sentence remains primary overall, but is added to the guidelines sentence or concurrent to the guidelines sentence, as determined by the court.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
    - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime.
    - When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

For the "base" sentence, the offender's full criminal history is to be applied to determine the presumptive range for that crime. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I (far right) column of the grid according to the severity level of the crime. K.S.A. 2013 Supp. 21-6819(b)(3) and (b)(5).

WHEN PRIMARY CRIME IS PRISON

If the sentence for the primary crime is prison, the entire imprisonment term of the consecutive sentences will be served in prison, even if the additional crimes are presumptive nonprison. K.S.A. 2013 Supp. 21-6819(b)(6).

"DOUBLE" RULE

When consecutive sentences are imposed, the total prison sentence imposed cannot exceed twice the base sentence. This is referred to as the "double rule." K.S.A. 2013 Supp. 21-6819(b)(4). This means that the sentencing court is not required to shorten the length of any of the individual non-base sentences given to an offender, as long as the court orders that the total sentence given to the offender is adjusted so that it does not exceed twice the base sentence. The term "base sentence" applies to the base sentence actually imposed, not to the maximum base sentence that could have been imposed according to the sentencing grid. *State v. Snow*, 282 Kan. 323, 341-42, 144 Kan. 729 (2006). The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the nonbase sentence. K.S.A. 2013 Supp. 21-6819(b)(1). This allows the court the discretion to impose less than the full sentence for each additional offense ordered to run consecutively to the primary offense.

ON-GRID AND OFF-GRID CONVICTIONS

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 2013 Supp. 21-6819(b)(2).

NONPRISON SENTENCES RUN CONCURRENT

In cases of multiple nonprison sentences, the nonprison (probation) terms shall <u>not</u> be aggregated or served consecutively. If the underlying prison sentences for a nonprison sentence are ordered to run consecutively and the nonprison term is revoked, the offender will serve the prison terms consecutively. K.S.A. 2013 Supp. 21-6819(b)(8).

CRIMES COMMITTED PRIOR TO JULY 1, 1993

If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.

If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Prisoner Review Board or reaches the maximum sentence date on the old sentence, whichever is earlier.

The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 2013 Supp. 21-6606(e)(2).

POSTRELEASE SUPERVISION

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of postrelease supervision. K.S.A. 2013 Supp. 22-3717(d)(1)(F). Postrelease supervision periods will not be aggregated.

CONSOLIDATION

Orders of consolidation should be completed in both cases. PSI's should be prepared for both cases wherein the primary offense is indicated by Case and Count Number, as well as subsequent counts. A separate Journal Entry of Judgment form (JE) must be used for each separate Case Number that is consolidated with the primary case. All cases should have their own JE, including misdemeanor cases, with felony PSI's and Criminal History included with felony offenses. All counts other than the primary offense in the primary case will use Criminal History I.

DEPARTURES AND DEPARTURE FACTORS

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state in its motion the type of departure sought and the reasons relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. K.S.A. 2013 Supp. 21-6817(a)(1) and (a)(3).

At the conclusion of the departure hearing or within 21 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order. K.S.A. 2013 Supp. 21-6817(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 2013 Supp. 21-6817(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 2013 Supp. 21-6815(c)(3).

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and
- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 2013 Supp. 21-6815(d)(1)-(d)(4).

MITIGATING FACTORS

The following nonexclusive list of statutorily enumerated factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;
- The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense. K.S.A. 2013 Supp. 21-6815(c)(1)(A) – (E).

Subsection (e) of K.S.A. 2013 Supp. 21-6815 provides additional mitigating factors to be considered. It provides that, "Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:
- the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the prosecutor's evaluation of the assistance rendered;
- the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- the nature and extend of the defendant's assistance;
- any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from such assistance; and
- the timeliness of the defendant's assistance." K.S.A. 2013 Supp. 21-6815(e).

For Jessica's Law departures, the sentencing judge may rely on the same mitigating factors to find substantial and compelling reasons for a departure from the mandatory minimum of Jessica's Law, and to support an additional departure from the default prison sentence pursuant to the sentencing guidelines act. *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

AGGRAVATING FACTORS

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:
- The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- The offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant's belief or perception was correct;
- The offense involved a fiduciary relationship which existed between the defendant and the victim;
- The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;

- The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section;
- The defendant was incarcerated at the time the crime was committed; or
- The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager, or supervisor. K.S.A. 2013 Supp. 21-6815(c)(2)(A) – (H).

DRUG GRID CRIMES - ADDITIONAL AGGRAVATING FACTORS

In addition to the factors listed above, the following aggravating factors which apply to drug felonies committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

- The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
  - The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
  - The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
  - The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
  - The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
  - Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
  - Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
  - A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation, or delivery of controlled substances.
- The offender possessed illegal drugs:
  - With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
  - With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age;
- The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the individual was under 16 years of age;
- The offender was incarcerated at the time the crime was committed. K.S.A. 2013 Supp. 21-6816(a)(1) – (a)(4).
- In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2013 Supp. 21-6816(b).

DURATIONAL DEPARTURES

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 2013 Supp. 21-6818(b).

DISPOSITIONAL DEPARTURES

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 2013 Supp. 21-6818(c) and (d). When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 2013 Supp. 21-6818(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

JESSICA'S LAW OFFENSES

When the court finds substantial and compelling reasons to impose a downward departure, the court may impose the guidelines sentence in lieu of the mandatory minimum sentence. K.S.A. 2013 Supp. 21-6627(c).

A downward departure from an off-grid Jessica's Law sentence must first depart to a guidelines sentence within the grid box reflecting the offender's criminal history and the severity level of the crime when the victim's age and the offender's age are not considered. If the sentencing judge wishes to depart from the presumptive guidelines sentence, the court must also consider whether substantial and compelling factors exist to justify a second departure from the presumptive sentence. *State v. Jolly*, 291 Kan. 842, 249 P.3d 421 (2011) and *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

CRIMES OF EXTREME SEXUAL VIOLENCE

No downward dispositional departure shall be imposed for any crime of extreme sexual violence, as defined in K.S.A. 2013 Supp. 21-6815 and the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to less than 50% of the center of the range of the sentence for such crime. K.S.A. 2013 Supp. 21-6818(a).

SEX OFFENDER POSTRELEASE SUPERVISION DEPARTURE

If an offender is convicted of a sexually motivated crime, as defined in 2013 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2013 Supp. 22-3717(d)(1)(D)(i) and (ii).

JURY TRIAL PROCEDURES FOR UPWARD DURATIONAL DEPARTURE

- If the State seeks an upward durational departure sentence, the aggravating factor(s) must first be stipulated to by defendant or proven to a unanimous jury beyond a reasonable doubt. In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the Supreme Court held that facts (aggravators) that would increase the penalty beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Legislature then amended K.S.A. 21-4716 [now K.S.A. 2013 Supp. 21-6815(b)] to provide a statutory framework for such a jury proceeding.
- Under *State v. Horn*, 291 Kan. 1, 238 P.3d 238 (2010), the Supreme Court identified a defect in the statutory language in K.S.A. 21-4718. The issue concerned the submission of aggravating fact evidence to a jury impaneled only for that purpose, where defendant had only waived his right to trial by jury by his guilty plea, but did not waive his right to trial by jury on the upward departure factors. The Court held that the statutory language as enacted did not enable a court to impanel a jury only to hear aggravating fact evidence. K.S.A. 21-6817 allows the court to conduct a separate jury proceeding on upward durational departure sentencing factors even if the defendant has waived a jury trial on the issue of guilt by entering a guilty or no contest plea. The defendant can waive the right to have such a jury trial on the aggravating factors. The defendant must be informed of the right to have aggravating departure factors determined by a jury in order for such waiver to be valid. *State v. Duncan*, 291 Kan. 467, 243 P. 3d 338 (2010).
- A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 7 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 2013 Supp. 21-6817(b)(1). The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 2013 Supp. 21-6817(b)(2).
- The jury shall determine, based on the reasonable doubt standard, whether aggravating factors exist that may serve to enhance the maximum sentence. If one or more aggravating factors are found to exist, by a unanimous jury vote, such factors shall be reported to the court on a special jury verdict form. K.S.A. 2013 Supp. 21-6817(b)(4) and (b)(7).

DEPARTURE AND CONSECUTIVE SENTENCING COMBINATION

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

- The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 2013 Supp. 21-6819(c)(1).
- When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 2013 Supp. 21-6819(c)(2).
- The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This, referred to as the "double-double rule", means that the total prison term of the consecutive sentences must not be more than twice the upward departure sentence. K.S.A. 2013 Supp. 21-6819(c)(3).

Examples
An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5), and theft with a loss of at least $1,000 but less than $25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2 x 94, or 188 months. Here, the total sum of 94 + 32 + 6 would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping at Maximum Presumptive Sentence = 100 months
(Kidnapping at severity level 3, criminal history D on the nondrug grid)
Other sentences: Aggravated Burglary and Theft = 32 and 6 months.
(Aggravated Burglary at severity level 5, criminal history I and
Theft at severity level 9, criminal history I on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2 x 200, or 400 months. The sum of 200 + 32 + 6, or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes 200 + 64 + 12, or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the "double-double rule" allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App.2d 747, 195 P.3d 282 (2008).

REPORTING DISPOSITIONS TO THE KANSAS SENTENCING COMMISSION

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2013 Supp. 22-3426(d). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2013 Supp. 21-6813 to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 2013 Supp. 22-3439(a).

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Revocation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2013 Supp. 22-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the Department of Corrections, the court shall forward a signed copy of the Journal Entry of Revocation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2013 Supp. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2013 Supp. 74-9101(b)(5).

The Kansas Sentencing Commission staff will also review felony journal entries and notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 2013 Supp. 21-5412, committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 2013 Supp. 22-3439(c).

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to class A and B misdemeanors under Kansas criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 2013 Supp. 12-4106(e).

DNA SAMPLE COLLECTION

Offenders who are convicted of certain crimes, or adjudicated of certain juvenile offenses, shall be required to submit a DNA or biological sample to the Kansas Bureau of investigation. The details of this procedure are provided K.S.A. 21-2511.

CHAPTER VI: DRUG TREATMENT – SB 123 PROGRAM

TARGET POPULATION

K.S.A. 2013 Supp. 21-6604(n) provides a mandatory nonprison sanction of certified drug abuse treatment under community corrections supervision for certain drug possession offenders.
This target population shall be required to undergo a criminal risk-need and drug abuse assessment:

Adult offenders convicted of drug possession, (K.S.A. 2013 Supp. 21-5706) who:
(1) have NO felony conviction(s) of drug manufacturing (K.S.A. 2013 Supp. 21-5703), drug cultivation (K.S.A. 2013 Supp. 21-5705(c)), drug distribution (K.S.A. 2013 Supp. 21-5705(a)) or unlawful use of proceeds of a drug crime (K.S.A. 2013 Supp. 21-5716);

-AND-

(2) (A) whose offense is in the 5-C, 5-D, 5-E, 5-F, 5-G, 5-H or 5-I grids blocks of the drug grid

-OR-

(B) in the 5-A or 5-B grids blocks of the drug grid if:
(i) the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses; AND
(ii) the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. See K.S.A. 2013 Supp. 21-6824(a).

Offenders who have been convicted of a third or subsequent violation of K.S.A. 2013 Supp. 21-5706 (or K.S.A. 65-4160 or 65-4162, prior to their repeal, or K.S.A. 2010 Supp. 21-36a06, prior to its transfer) shall not be eligible for SB, but shall be sentenced to prison pursuant to K.S.A. 2013 Supp. 21-6805(f).

Offenders convicted of *attempted* possession are not eligible for SB 123. *State v. Perry-Coutcher*, 45 Kan.App.2d 911, 254 P.3d 566 (2011). Likewise, offenders convicted of conspiracy and solicitation to commit drug possession will not be eligible for SB 123 treatment.

Offenders who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law. K.S.A. 2013 Supp. 21-6824(h).

CRIMINAL RISK-NEED AND DRUG ABUSE ASSESSMENTS

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 2013 Supp. 21-6824(a), unless otherwise specifically ordered by the court, shall be subject to a drug abuse assessment and a criminal risk-need assessment. Both assessments must be completed prior to sentencing.

The Kansas Sentencing Commission has adopted the use of the LSI-R (Level of Service Inventory – Revised) as the mandatory criminal risk-need assessment and the SASSI (Substance Abuse Subtle Screening Inventory) as the mandatory drug abuse assessment.

The presentence criminal risk-need assessment shall be conducted by a court services officer or a

community corrections officer. Offenders shall be assigned a risk status based on the results of the assessment. K.S.A. 2013 Supp. 21-6824(b).

The presentence drug abuse assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services and shall include a clinical interview and a recommendation concerning drug abuse treatment for the offender. See K.S.A. 2013 Supp. 75-52,144(b).

The risk-need assessment and drug abuse assessment are only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. K.S.A. 2013 Supp. 21-6813(c).

QUALIFICATION FOR TREATMENT

As of July 1, 2012, participation in SB 123 treatment has been limited to include only those offenders who have both moderate to high criminal risk-need and high drug abuse assessment scores.

If the offender is assigned a high risk status as determined by the drug abuse assessment performed pursuant to subsection (b)(1) and a moderate or high risk status as determined by the criminal risk-need assessment performed pursuant to subsection (b)(2), the sentencing court shall commit the offender to treatment in a drug abuse treatment program, under community corrections supervision, until the court determines the offender is suitable for discharge by the court. The term of treatment shall not exceed 18 months. K.S.A. 2013 Supp. 21-6824(c) and (d)(1).

If the offender's risk-need assessment and drug abuse assessment scores do not qualify the offender for treatment, the offender will be supervised by either court services or community corrections, depending on the results of the criminal risk-need assessment. K.S.A. 2012 Supp. 21-6824(d)(2).

The court may order an offender who otherwise does not meet the requirements of subsection (c) to undergo one additional drug abuse assessment while such offender is on probation. Such offender may be ordered to undergo drug abuse treatment pursuant to subsection (a) if such offender is determined to meet the requirements of subsection (c). The cost of such assessment shall be paid by such offender. K.S.A. 2013 Supp. 21-6824(i).

PAYMENT OF FEES

All offender assessments, regardless of whether the offender is sentenced for SB 123 treatment, will initially be paid by the Kansas Sentencing Commission.

The sentencing court shall determine the extent, if any, that such person is able to pay for such assessment and treatment. Such payments shall be used by the supervising agency to offset costs to the state. If such financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the offender's sentence. K.S.A. 75-52,144.
For those assessed but not eligible for treatment, it is requested that a $200 assessment fee be ordered at sentencing. For those sentenced to SB 123 treatment, a $200 assessment fee and a $100 reimbursement fee for treatment costs continues to be requested to be ordered by the court at sentencing along with other fees and court costs. If the court determines that the offender has the ability to pay a larger portion of the SB 123 treatment cost, the court may order such offender to do so.

In a plea agreement situation, the court may direct the defendant to undergo the assessments at any time in order to determine SB 123 eligibility. The defendant will still be responsible for payment of all assessment fees imposed by the court at sentencing.

LENGTH OF TREATMENT

The term of treatment shall not exceed 18 months. The term of treatment may not exceed the term of probation. K.S.A. 2013 Supp. 21-6824(c).The court may extend the term of probation, pursuant to subsection (c)(3) of K.S.A. 2013 Supp. 21-6608, and amendments thereto.

CONDITION VIOLATIONS

VIOLATION SANCTIONS

Offenders who violate a condition of the drug treatment program shall be subject to a nonprison sanction of up to 60 days in county jail, fines, community service, intensified treatment, house arrest or electronic monitoring. K.S.A. 2013 Supp. 22-3716(g).

In addition, an offender in SB 123 may be subject to graduated sanctions for probation violations pursuant to 2013 House Bill 2170, K.S.A. 2013 Supp. 22-3716(c)(1). For more information on Probation Violations, see Chapter VIII.

REVOCATION OF PROBATION

If the defendant fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding, the defendant shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 2013 Supp. 21-6805. K.S.A. 2013 Supp. 21-6604(n) and 21-6824(f).

Offenders in SB 123 may also be revoked pursuant to the provisions of K.S.A. 22-3716(c). Condition violations may result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, 135 P.3d 1191 (2006).

The amount of time spent participating in the SB 123 program shall not be credited as service on the underlying prison sentence. K.S.A. 2013 Supp. 21-6604(n).

POSTRELEASE SUPERVISION

Offenders who complete SB 123 treatment and do not have their probation revoked will not be subject to postrelease supervision.

Offenders in the SB 123 program who are convicted on or after July 1, 2003, but prior to July 1, 2013, and have their probation revoked, shall not be subject to a period of postrelease supervision upon completion of the underlying prison sentence. However, offenders whose crime of conviction was committed on or after July 1, 2013, shall serve a period of postrelease supervision if their probation is revoked or their underlying prison term expires while serving a 120/180-day prison sanction pursuant to subsection (c)(1)(C) or (c)(1)(D) of K.S.A. 2013 Supp. 22-3716.

*CONSERVATION CAMP

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks prior to July 1, 2012, or on and after July 1, 2012, grid blocks 5-C, 5-D, 5-E or 5-F, but does not qualify for the SB 123 drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. K.S.A. 2013 Supp. 21-6604(g).

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 5-C, 5-D, 5-E or 5-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 2013 Supp. 21-6824. K.S.A. 2013 Supp. 21-6604(l).

**In practice, all the nonprison alternatives provided in K.S.A. 2013 Supp. 21-6604(g) are no longer viable placement alternatives. The Kansas Court of Appeals, in State v. Johnson, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2013 Supp. 21-6604(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections.*

CHAPTER VII: OFFENDER REGISTRATION

For a listing of offenses that require registration, please refer to the statutory crime listing in Appendix D. Offenses requiring registration are marked with an "**R"**.

LENGTH OF REGISTRATION REQUIREMENT

The Kansas Offender Registration Act requires offenders who are convicted of certain crimes to register as an offender for a duration of either 15 years, 25 years or for the lifetime of the offender. The length of registration for each crime is provided in K.S.A. 22-4906, and on page 2 of the Offender Registration Supplement of the Journal Entry of Judgment.

Any person who has been declared a sexually violent predator pursuant to K.S.A. 59-29a01 et seq. shall be required to register for life. K.S.A. 22-4906(e).

An offender who is convicted of two or more offenses requiring registration shall be required to register for life. K.S.A. 22-4906(c).

Convictions or adjudications which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication. A conviction or adjudication from any out of state court shall constitute a conviction or adjudication for purposes of the act. K.S.A. 22-4902(g).

OFFENDER REGISTRATION TYPE

Offenders will be required to register as either a sex offender, violent offender or drug offender, depending on their crime of conviction. See K.S.A. 22-4902 and page 1 of the Offender Registration Supplement of the Journal Entry of Judgment. An offender who commits multiple crimes may be required to register as multiple types of offender simultaneously.

DUTIES OF THE SENTENCING COURT

At the time of conviction or adjudication for an offense requiring registration, the court is required to inform the offender, on the record, of the procedure to register and the duties of the offender pursuant to the act. K.S.A. 22-4904(a)(1)(A).

In addition, if the offender is being released, the court shall:

- Complete a notice of duty to register, which shall include title and statute number of conviction or adjudication, date of conviction or adjudication, case number, county of conviction or adjudication, and the following offender information: Name, address, date of birth, social security number, race, ethnicity and gender;
- require the offender to read and sign the notice of duty to register, which shall include a statement that the requirements provided in this subsection have been explained to the offender;
- order the offender to report within 3 business days to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where the offender resides, maintains employment or attends school, to complete the registration form with all information and any updated information required for registration as provided in K.S.A. 22-4907, and

- provide one copy of the notice of duty to register to the offender and, within three business days, send a copy of the form to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation. K.S.A. 22-4904(a)(1)(B).

At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 22-4902(a)(2).

VIOLATION OF THE ACT

Offenders who fail to comply with the provisions of the offender registration act shall be subject to the penalties provided in K.S.A. 22-4903. Upon a first offense, violation of the act is a severity level 6 person felony, and upon a second offense, a level 5 person felony. Offenses which continue for more than 30 consecutive days shall constitute a new and separate offense every 30 days thereafter. K.S.A. 2013 Supp. 22-4903(a).

An act which continues for more than 180 consecutive days is an aggravated offense, which is a severity level 3 person felony. Any aggravated violation of the Kansas offender registration act which continues for more than 180 consecutive days shall, upon the 181st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate violation of the Kansas offender registration act every 30 days thereafter, or a new and separate aggravated violation of the Kansas offender registration act every 180 days thereafter, for as long as the violation continues. K.S.A. 22-4903(b).

CRIMINAL HISTORY CALCULATION

An element of the crime of violating requires that an offense requiring registration be committed. Therefore, the offense giving rise to the registration requirement may not be counted in the offender's criminal history when the current crime of conviction is violation of the offender registration act. See K.S.A. 2013 Supp. 21-6810(d)(9).

However, all other prior convictions, including other convictions for offenses requiring registration, may be counted and scored unless otherwise prohibited. If an offender is required to register due to a prior case with multiple counts, and the offender was convicted of more than one count of crimes requiring registration, then one count will serve as an element of the crime of failure to register and the other count(s) may be scored as part of the criminal history. *State v. Deist*, 44 Kan. App. 2d 655, 239 P.3d 896 (2010).

CHAPTER VIII: PROBATION VIOLATIONS AND REVOCATION

Please note the change in the terminology of the word "revoke." Under the framework imposed by 2013 House Bill 2170, a court may no longer revoke and subsequently reinstate probation. Rather, the court may now impose sanctions, lengthen the period of probation or modify the conditions of probation without revocation. "Revocation" now means that the offender is being sent to prison to serve the underlying sentence and will no longer be eligible for reinstatement. For all instances in which the court wants to impose a quick dip or 120/180-day prison sanction, extend the length of probation or modify the conditions or probation, the court should <u>not</u> revoke probation.

The 2013 Probation Violation Journal Entry form (see Appendix C) has been modified substantially to account for the changes imposed by 2013 House Bill 2170.

GRADUATED SANCTIONS

The graduated sanctions of 2013 House Bill 2170 are a comprehensive and complex change to probation procedure in Kansas. To provide the most up-to-date answers to questions about these new procedures, a frequently asked questions document is being maintained on the KSC website at http://www.sentencing.ks.gov/hb-2170/frequently-asked-questions.

2013 House Bill 2170 created graduated sanctions that require a probation violator to be incarcerated for a period of time determined by the number of previous probation violations the offender has committed.

QUICK DIPS

An offender who commits a first probation violation will be subject to a "quick dip" sanction of 2 or 3 days in the county jail. This sanction may also be imposed for multiple subsequent violations, not to exceed 18 total days during the length of the offender's probation. K.S.A. 2013 Supp. 21-3716(c)(1)(B).

120 OR 180-DAY PRISON SANCTIONS

If an offender who has previously received a 'quick dip' sanction commits another violation of the terms of their probation, the court may impose a sanction of 120 or 180 days, to be served in the custody of the secretary of corrections. The secretary shall have the discretion to reduce the length of such sanction by up to half. K.S.A. 2013 Supp. 21-3716(c)(1)(C) and (c)(1)(D).

Probation condition violators are required to be placed in a community corrections program at least once prior to placement in a state correctional facility pursuant to K.S.A. 2013 Supp. 22-3716(c)(2), unless the court finds that the safety of the members of the public will be jeopardized or the welfare of the inmate will not be served by such assignment to community corrections. K.S.A. 2013 Supp. 22-3716(c)(4).

REVOCATION OF PROBATION

If the offender has previously received a 120 or 180-day prison sanction, the court may revoke the offender's probation and require them to serve their underlying prison sentence, or a portion thereof, in the custody of the secretary of corrections. K.S.A. 2013 Supp. 21-3716(c)(1)(E).

The court may revoke the probation of an offender who commits a new crime or absconds from supervision, and require them to serve their underlying prison sentence regardless of previous graduated sanctions, or lack thereof. K.S.A. 2013 Supp. 22-3716(c)(8).

The court may revoke a probation violator's probation by finding and setting forth with particularity the reasons why public safety will be jeopardized or the offender's welfare will not be served, regardless of previous graduated sanctions, or lack thereof. K.S.A. 2013 Supp. 22-3716(c)(9).

SUPERVISING OFFICER QUICK DIP AUTHORITY

K.S.A. 2013 Supp. 22-3716(b)(4)(A) gives court services officers, and (b)(4)(B) gives community corrections officers, the authority to impose a 'quick dip' sanction for a probation violation. The supervising officer must have the concurrence of their chief court services officer or community corrections director, respectively, and must not have had the authority to impose such sanction withheld by the sentencing court. See also K.S.A. 2013 Supp. 21-6604(s) and (t).

The sentencing court may choose to withhold this authority from the court services or community corrections officer at sentencing. The 2013 Journal Entry of Sentencing includes a check box where this authority may be specifically withheld.

NEW FELONY COMMITTED DURING PROBATION OR PRESUMPTIVE DISCHARGE PERIOD

When an offender is sentenced for a crime committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence is mandated by K.S.A. 2013 Supp. 21-6606(c). If the new offense is a felony, the sentencing court may sentence the offender to prison, even if such offense otherwise presumes a nonprison sentence. K.S.A. 2013 Supp. 21-6604(f).

On and after July 1, 2013, an offender who receives presumptive discharge from probation pursuant to K.S.A. 2013 Supp. 21-6608(d) and commits a felony during the time in which the offender would have been under supervision had it not been for the early discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2013 Supp. 21-6604(f)(2).

POSTRELEASE SUPERVISION

Offenders who successfully complete probation or a nonprison sanction are not required to serve a period of postrelease supervision.

For crimes committed on and after July 1, 2013, an offender who is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes their underlying prison term while serving a 120 or 180-day graduated sanction, the offender shall be required to complete a period of postrelease supervision. K.S.A. 2013 Supp. 22-3716(f).

CHAPTER IX: APPEALS

APPELLATE REVIEW PRINCIPLES – K.S.A. 2013 SUPP. 21-6820

A departure sentence can be appealed by the defendant or the state to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 2013 Supp. 21-6820(a). Pending review of the sentence, the sentencing court, or the appellate court may order the defendant confined or placed on conditional release, including bond. K.S.A. 2013 Supp. 21-6820(b). On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record. K.S.A. 2013 Supp. 21-6820(c).

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. K.S.A. 2013 Supp. 21-6820(d). A defendant's allegation that there was a constitutional error in an individual presumptive sentence does not grant the appellate court jurisdiction to review the sentence. *State v. Huerta*, 291 Kan. 831, 247 P.3d 1043 (2011). In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. K.S.A. 2013 Supp. 21-6820(e).

The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. K.S.A. 2013 Supp. 21-6820(f). In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case, the court shall follow all of the provisions of K.S.A. 2013 Supp. 21-6819 concerning the sentencing of multiple conviction cases. K.S.A. 2013 Supp. 21-6819(b)(5).

The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 2013 Supp. 21-6820(i).

MANDATORY MINIMUM SENTENCES IN FIRST DEGREE MURDER TRIALS

2013 House Bill 2002, which was passed by the legislature during a special session in September of 2013, addresses the United States Supreme Court decision in *Alleyne v. U.S.*, 133 S.Ct. 2151, 2161–63, 186 L.Ed.2d 314 (2013), which held that factors which increase a mandatory minimum sentence must be found, beyond a reasonable doubt, by a jury. Prior to the passage of 2013 House Bill 2002, the Kansas procedure allowed the court, not they jury, to make such findings.

HB 2002 provides offenders, who were convicted of premeditated first degree murder and sentenced to a mandatory minimum sentence of 40 or 50 years by the court prior to the passage of 2013 House Bill 2002, a procedure to appeal such sentence, and the jury, not the court, shall be the finder of fact on the issue of the increased mandatory minimum.

CHAPTER X: POSTRELEASE SUPERVISION

Upon completion of the prison portion of the sentence, all inmates who committed their crime of conviction on or after July 1, 2013 will be released to serve a term of postrelease supervision.

For crimes committed on and after July 1, 2013, if an offender is revoked from a nonprison sanction and ordered to serve their underlying prison sentence or completes the underlying prison term while serving a 120/180 day graduated sanction, such offender shall be required to complete a period of postrelease supervision. K.S.A. 2013 Supp. 22-3716(e).

LENGTH OF SUPERVISION

The Prisoner Review Board reviews release plans. However, the Board is unable to make any changes regarding prison release dates for offenders sentenced under the KSGA. K.S.A. 2013 Supp. 22-3717(i).

CRIME	LENGTH OF POSTRELEASE
NONDRUG Level 1,2,3 or 4 DRUG Level 1, 2 or *3	36 MONTHS K.S.A. 22-3717(d)(1)(A) Except that Offenders sentenced for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995 may receive a postrelease supervision period of 24 months.
NONDRUG Level 5 or 6 DRUG Level ^3 or *4	24 MONTHS K.S.A 22-3717(d)(1)(B)
NONDRUG Level 7, 8, 9 or 10 DRUG Level ^4 or *5	12 MONTHS K.S.A 22-3717(d)(1)(C)
Sexually Motivated Crime	Up to 60 months K.S.A. 22-3717(d)(1)(D)(i)

*= for crimes committed on and after July 1, 2012 only
^= for crimes committed prior to July 1, 2012 only

GOOD TIME CREDIT

On after July 1, 2013 offenders, other than offenders whose term of imprisonment includes a sentence for a sexually violent crime, a sexually motivated crime, electronic solicitation or unlawful sexual relations, will not have their good time and program credit earned while incarcerated added to the end of their period of postrelease supervision. K.S.A. 2013 Supp. 22-3717(d). Sex offenders will still be required to serve any good time and program credit earned while in prison under postrelease supervision. K.S.A. 22-3717(d)(1)(D).

K.S.A. 2013 Supp. 22-3717(s) states that all modifications to the period of postrelease as provided in subsection (t) shall be applied retroactively. K.S.A. 2013 Supp. 22-3717(t) requires the department of corrections to modify the periods of postrelease supervision of offenders who were sentenced prior to July 1, 2013 in order to apply the new rule that good time and program credit will no longer be required to be added on to the offender's period of postrelease supervision.

REDUCTION OF POSTRELEASE SUPERVISION PERIOD

Offenders sentenced to a 36 or 24-month period of postrelease supervision may have their period of supervision reduced by up to 12 months, and offenders sentenced to a period of 12 months may have their period of supervision reduced by up to 6 months, based on the offender's compliance and overall performance while on postrelease supervision. K.S.A. 22-3717(d)(1)(E).

The Prisoner Review Board may grant an offender early discharge from their period of postrelease supervision if such offender petitions the Board for early release and has paid all restitution. K.S.A. 2013 Supp. 22-3717(d)(2).

MULTIPLE CONVICTION CASES

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term, including off-grid crimes, will determine the period of supervision. K.S.A. 2013 Supp. 22-3717(d)(1)(F). Postrelease supervision periods will not be aggregated.

SEXUALLY MOTIVATED CRIME DEPARTURES

If an offender is convicted of a sexually motivated crime, as defined in 2013 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2013 Supp. 22-3717(d)(1)(D)(i) and (ii).

The Prisoner Review Board may, in its discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs, payment of all restitution and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2013 Supp. 22-3717(d)(1)(D)(vi).

JESSICA'S LAW AND SEXUALLY VIOLENT OFFENSE SUPERVISION

Offenders convicted of certain Jessica's Law offenses as provided in K.S.A. 2013 Supp. 21-6627, wherein the offender was 18 years of age or older and the victim was less than 14 years of age, committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Prisoner Review Board. When the Prisoner Review Board orders the parole of an inmate, the Board shall also order that the inmate be electronically monitored for the duration of the inmate's natural life. K.S.A. 2013 Supp. 22-3717(u).

The court shall order that any defendant sentenced pursuant to K.S.A 2013 Supp. 21-6627 (Jessica's Law) shall, upon release from imprisonment, be electronically monitored for the duration of the defendant's life. K.S.A. 2013 Supp. 21-6604(r).

An offender who is given a downward departure from the mandatory minimum to the guidelines sentence, shall, upon completion of the prison sentence, be subject to postrelease supervision.

An offender convicted of any sexually violent crime, as defined in K.S.A. 2013 Supp. 22-3717(d)(5), committed on or after July 1, 2006, other than a Jessica's Law offense, shall be released to a mandatory

period of postrelease supervision for the duration of the person's natural life. K.S.A. 2013 Supp. 22-3717(d)(1)(G).

OTHER OFF-GRID OFFENSES

In the discretion of the Prisoner Review Board, offenders convicted of an off-grid crime may be granted parole after the offender has served the mandatory minimum prison sentence. The Prisoner Review Board may not discharge an offender from parole within a period of less than one year after release from prison. K.S.A. 22-3722.

For more information on parole and off-grid offenses, please see the Off-grid Crimes section of Chapter I.

VIOLATIONS OF POSTRELEASE SUPERVISION CONDITIONS

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment for six months and such time may be reduced by not more than 3 months based upon the inmate's conduct, work and program participation during the imprisonment period. K.S.A. 2013 Supp. 75-5217(b). If the violation results from a conviction of a new felony or misdemeanor, upon revocation of postrelease supervision, the offender will serve a period of confinement, to be determined by the prisoner review board. K.S.A. 2013 Supp. 75-5217(c) and (d).

On and after July 1, 2013, an offender who is granted early discharge from postrelease supervision pursuant to K.S.A. 2013 Supp. 22-3717(d)(2), and commits a felony during the time in which the offender would have been under supervision had it not been for discharge, may be sentenced to prison for the new felony even if the sentence for such felony is presumptive nonprison. K.S.A. 2013 Supp. 21-6604(f)(2).

CHAPTER XI: RETROACTIVITY OF SENTENCING GUIDELINES

The retroactive provision of the KSGA applies to incarcerated offenders who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. K.S.A. 21-4724(c)(1).

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. K.S.A. 21-4724(c). The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4). If a hearing was requested within the 30 days, the parties could challenge the KDOC's determination of the crime severity or the criminal history, or seek a departure sentence if the offender was eligible for conversion of the sentence to a guidelines sentence. K.S.A. 21-4724(d).

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. K.S.A. 21-4724(d)(1). If a hearing was requested, the sentencing court determined whether the offender was eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. K.S.A. 21-4724(d)(2). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f).

CONVERSION OF SENTENCE FOR A CRIME COMMITTED BETWEEN JULY 1, 1993, AND MARCH 24, 1994

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

- Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
- Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

CHAPTER XII: POINTS OF INTEREST ABOUT THE GUIDELINES

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

CRIME SEVERITY AND CRIMINAL HISTORY CONSTRAIN SENTENCING DECISIONS

The KSGA provides a grid-based sentencing scheme dependent on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids indicate the range of sentence lengths (duration) presumed by statute to be appropriate for an offender. Further, they indicate whether the defendant should be presumed by statute to be granted probation or remanded to prison (disposition). The sentencing court has discretion to grant a sentence other than that presumed by the grid box, a departure sentence, if the court finds substantial and compelling reasons to do so. If the offender's case falls in a border box, the length of sentence is still presumed under the KSGA, but the sentencing court, without finding substantial and compelling reasons, can grant an optional nonprison sentence of probation. An "optional nonprison sentence" is a sentence which the court may impose, in lieu of the presumptive sentence, upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
- the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or
- the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

GUIDELINES LEAVE ROOM FOR PROPERLY JUSTIFIED EXERCISE OF DISCRETION

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face" for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 2013 Supp. 6815(b) [formerly K.S.A. 21-4716]. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial or plea. K.S.A. 2013 Supp. 21-6817(b)(2).

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court

also has the discretion to decide whether sentences should run concurrently or consecutively. K.S.A. 2013 Supp. 21-6819.

PRESENTENCE INVESTIGATION REPORT IS MANDATORY

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender as is available. K.S.A. 2013 Supp. 21-6813(a).

PLEA AGREEMENTS

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. However, the court may impose up to the maximum sentence provided in the applicable grid box, even if the parties have recommended a lesser sentence. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 2013 Supp. 21-6807(b)(4) and 21-6812.

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. K.S.A. 2013 Supp. 21-6807(b)(4) and 21-6812 and K.S.A. 2013 Supp. 22-3210.

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. K.S.A. 2013 Supp. 21-6807 and K.S.A. 2013 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. K.S.A. 2013 Supp. 21-6807(c)(4).

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THE APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

- Guilty plea
- No contest plea
- Bench trial
- Jury trial

4. CONFIRM THAT EACH PARTY HAS BEEN SUPPLIED WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK EACH PARTY IF THERE IS A CHALLENGE TO THE CRIMINAL HISTORY.

- Require the parties to answer on the record.
- Address the defendant personally and ask whether he acknowledges the accuracy of the criminal history set out in the Criminal History Worksheet. K.S.A. 2013 Supp. 21-6814.
- If there are challenges to the criminal history, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
  - Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
  - A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
  - If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
  - Burden is on prosecution when defendant objects to criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, and the offender later challenges the established criminal history, the burden shifts to the defendant pursuant to 2009 Legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, now at K.S.A. 2013 Supp. 21-6814.
- If changes are made to the defendant's criminal history, the court should also make the changes on the Criminal History Worksheet.
- If the defendant's criminal history score is modified as the result of a challenge, confirm that the parties are prepared for sentencing and, if so, proceed.

6. STATE THE PRIMARY OFFENSE OF CONVICTION, THE CRIMINAL HISTORY SCORE, THE RANGE OF IMPRISONMENT SENTENCE LENGTHS (AGGRAVATED, STANDARD, MITIGATED) IN THE APPLICABLE GRID BOX, ANY GRID BOX PRESUMPTION (IMPRISONMENT, PROBATION, BORDER BOX), ANY SPECIAL RULE THAT AFFECTS THE GRID BOX PRESUMPTION, THE PERIOD OF POSTRELEASE SUPERVISION FOLLOWING RELEASE FROM IMPRISONMENT, THE APPLICABLE

PERCENTAGE OF GOOD TIME CREDIT THAT CAN BE EARNED, THE LENGTH OF THE PERIOD OF PROBATION, IF GRANTED, AND THE AGENCY TO SUPERVISE SUCH PROBATION.

7. IF THERE ARE ADDITIONAL FELONY OFFENSES, FOR EACH SUCH OFFENSE, IN ORDER OF DECREASING SEVERITY, APPLY CRIMINAL HISTORY "I" TO THE ADDITIONAL OFFENSES AND STATE THE INFORMATION IN PARAGRAPH 6 APPLICABLE TO THE ADDITIONAL OFFENSES.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

- There is no prescribed proceeding for a departure hearing under K.S.A. 2013 Supp. 21-6817.
- A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, "or within 21 days thereafter." K.S.A. 2013 Supp. 21-6817(a)(2).

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of "departure sentencing," a continuance must be granted. K.S.A. 2013 Supp. 21-6817(a)(1).

10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW THE WITNESSES FOR EITHER PARTY TO TESTIFY.

11. ASK EACH ATTORNEY FOR THE ATTORNEY'S SENTENCING SUGGESTIONS. THIS IS RELEVANT WHETHER OR NOT THE PARTIES HAVE AGREED TO RECOMMEND A PARTICULAR SENTENCE.

12. ASK IF ANY VICTIM(S) OR OTHERS WISH TO SPEAK CONCERNING THE SENTENCE(S) TO BE IMPOSED.

Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

13. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION UNDER K.S.A. 22-3422 AND 22-3424.

Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow such statements or evidence.

14. ASK THE DEFENDANT WHETHER HE HAS ANY LEGAL CAUSE TO SHOW WHY SENTENCE SHOULD NOT BE PRONOUNCED.

15. ANNOUNCE THE GRANTING OR DENIAL OF ANY REQUESTED DEPARTURE, CITING THE SUBSTANTIAL AND COMPELLING REASONS FOR THE DEPARTURE IF GRANTED.

- If a departure is denied there is generally no need to state the reasons for the denial. However, in denying a Jessica's Law departure back to a guidelines sentence, the record should be clear that the judge reviewed the defendant's asserted mitigating circumstances. See K.S.A. 2013 Supp. 21-6628(d).
- Statutory mitigating and aggravating factors may be found at K.S.A. 2013 Supp. 21-6815 (nondrug) and K.S.A. 2013 Supp. 21-6816 (drug).
- Sentencing courts must provide separate reasons based upon facts in the record for each durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- Reasons for departure must be "substantial and compelling." See K.S.A. 2013 Supp. 21-6815(a), 21-6816(a) and 21-6818(c)(2).
- Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2013 Supp. 21-6817(a)(4).
- For sex offenders, a postrelease supervision period of up to 60 months may be ordered. K.S.A. 2013 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2013 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

16. IF A SPECIAL RULE APPLIES, WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.
See listing of special rules in the next following section.

17. ANNOUNCE THE SENTENCE FOR THE PRIMARY OFFENSE.
Suggestion: Follow the information layout for the offense in the PSI. Example: Mr. Doe, for the primary offense of theft, a level 9 nonperson felony, with your criminal history of B, I sentence you to the standard term of 14 months in the custody of the secretary of corrections. Your departure request for probation is granted. The court finds substantial and compelling reasons for the departure as follows: the two person felonies in your criminal history arose from the same incident, a bar fight, which occurred twenty years ago; you have no convictions since you served those sentences; the victim of the theft, your mother, is convinced you stole from her to buy oxycodone to self-medicate the pain from back problems and you need drug treatment, not prison; a drug treatment program is available to you in the community; and, the State has joined in the request for a departure to probation. You are granted probation to be supervised by Community Corrections for 12 months. If your probation is revoked, you will be remanded to DOC to serve the time left on your sentence, after credit for time served, but you can earn up to 20% maximum good time credit. Upon your release from prison you would then be placed on postrelease supervision for 12 months.

18. ANNOUNCE ALL OTHER SENTENCES, STATING WHETHER EACH ADDITIONAL SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE PRIMARY OFFENSE SENTENCE.
The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 2013 Supp. 21-6606(c), (d) and (3). K.S.A. 2013 Supp. 21-6606(a).

As of July 1, 2012, when the Court imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term which may not exceed the sum of the consecutive imprisonment terms, and a supervision term. The sentencing judge shall have the discretion to impose a consecutive term of imprisonment for a crime other than the primary crime of any term of months not to exceed the

nonbase sentence. K.S.A. 2013 Supp. 21-6819(b)(1). This allows for consecutive sentencing for a count other than the primary offense up to the maximum sentence rather than requiring the full nonbase sentence. This change is reflected and may be entered in the Journal Entry of Judgment, Additional Offenses.

The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The "double rule" and "double-double rule" are found at K.S.A. 2013 Supp. 21-6819. The "double-double rule" applies to cap the total length of consecutive upward durational departure sentences. See *State v. Snow,* 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan.App.2d 747, 195 P.3d 282 (2008).

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING, IF THIS IS IN DISPUTE. ASSESS, OR DECLINE TO ASSESS, WITH PARTICULARITY, COSTS, FEES AND EXPENSES.

20. ESTABLISH THE NUMBER OF DAYS OF JAIL CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT'S "SENTENCE BEGINS DATE."
See K.S.A. 2013 Supp. 21-6615.

21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT.
See K.S.A. 2013 Supp. 21-6614.

22. ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL BY FILING THE NOTICE WITHIN 14 DAYS, UNDER K.S.A. 22-3608, AND THE RIGHT TO COUNSEL.
Even if defendant's jury trial counsel was retained, advise the defendant that he has the right to appeal his conviction and sentence, and, if he is indigent, counsel and the costs of the appeal will be afforded him. K.S.A. 22-3424(b). Likewise, when a defendant has been sentenced on a conviction resulting from a guilty or no contest plea, even if defendant's plea counsel was retained, advise the defendant that, if he is indigent and wants to appeal the sentence, counsel and the costs of the appeal will be afforded him. *State v. Ortiz,* 230 Kan. 733, 640 P.2d 1255 (1982).

23. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.
See K.S.A. 2013 Supp. 21-6304(a)(1) through (a)(3).

24. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER'S SENTENCE IS FULLY DISCHARGED.
See K.S.A. 2013 Supp. 21-6613. Anyone convicted of a felony on or after July 1, 2002 may not vote until his or her sentence is completed. This specifically includes a sentence of probation.

25. IF DEFENDANT IS REQUIRED TO REGISTER UNDER THE KANSAS OFFENDER REGISTRATION ACT (K.S.A. 2012 SUPP. 22-4901 *ET SEQ.*), ENSURE THE AGE OF THE VICTIM IS INCLUDED ON THE JOURNAL ENTRY OF JUDGMENT.
At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication. K.S.A. 2013 Supp. 22-4904(a)(2).

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SECRETARY OF CORRECTIONS OR THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND TO WHAT SUPERVISING AGENCY HE IS TO REPORT.

27. IF PROBATION IS ORDERED AND THE COURT WISHES TO WITHHOLD THE AUTHORITY OF COURT SERVICES OR COMMUNITY CORRECTIONS TO IMPOSE A 2-3 DAY JAIL SANCTION FOR PROBATION CONDITION VIOLATIONS, ENSURE THAT THE JOURNAL ENTRY FORM IS MARKED ACCORDINGLY.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

EMPHASIS OF GUIDELINES IS ON CRIMINAL HISTORY AND CRIME SEVERITY

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of journal entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. K.S.A. 2013 Supp. 21-6814.

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, or K.S.A. 2013 Supp. 21-6814.

PROVING THE AGE OF JESSICA'S LAW OFFENDERS

Imposition of an off-grid mandatory sentence of imprisonment under K.S.A. 2013 Supp. 21-6627 requires a factual finding that the offender was 18 years of age or older at the time of the offense. Unless the offender has stipulated to the offender's age, that age is a fact question that must be submitted to a jury and proved beyond a reasonable doubt. *State v. Brown*, 291 Kan. 646, 244 P.3d 267 (2011). The Kansas Judicial Council has suggested that the jury's factual finding on the offender's age be included under a separate question on the verdict form. See the Notes on Use under the various PIK-Criminal elements instructions for offenses subject to Jessica's Law enhancements.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

IMPORTANCE OF ACCURATE, VERIFIED CRIMINAL HISTORY

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet, and have an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2013 Supp. 21-6814.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right

to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2013 Supp. 21-6813. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. See K.S.A. 2013 Supp. 21-6814.

CAN ADVISE THE OFFENDER ABOUT TIME TO BE SERVED IN DEFINITE TERMS

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

COPIES OF REQUIRED DOCUMENTS SENT TO THE KSC

A copy of the Journal Entry of Judgment and the Presentence Investigation Report, including the Criminal History Worksheet, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2013 Supp. 21-6813(g) and K.S.A. 2013 Supp. 22-3439(a).

A copy of the Journal Entry of Probation Revocation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet within 30 days of the final disposition. K.S.A. 2013 Supp. 22-3439(b).

PROVIDING DOCUMENTATION OF PRIOR CONVICTIONS

Because of the importance of an accurate criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of journal entries and other documents, including requests from other jurisdictions.

PRESENTENCE INVESTIGATION REPORT IS PUBLIC RECORD

The Presentence Investigation Report (PSI), with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant, will be public record and may be kept in the court file. K.S.A. 2013 Supp. 21-6813.